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H. M. Boodle

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A

TREATISE

ON

THE LAW

OF

LANDLORD AND TENANT,

COMPILED IN PART FROM THE NOTES

OF THE LATE

SIR WILLIAM DAVID EVANS, KNT.,

RECORDER OF BOMBAY:

WITH AN

APPENDIX OF PRECEDENTS.

BY

CHARLES HARCOURT CHAMBERS, Esq.,

OF LINCOLN'S INN, BARRISTER AT LAW,

LONDON:

PRINTED FOR JOSEPH BUTTERWORTH AND SON,
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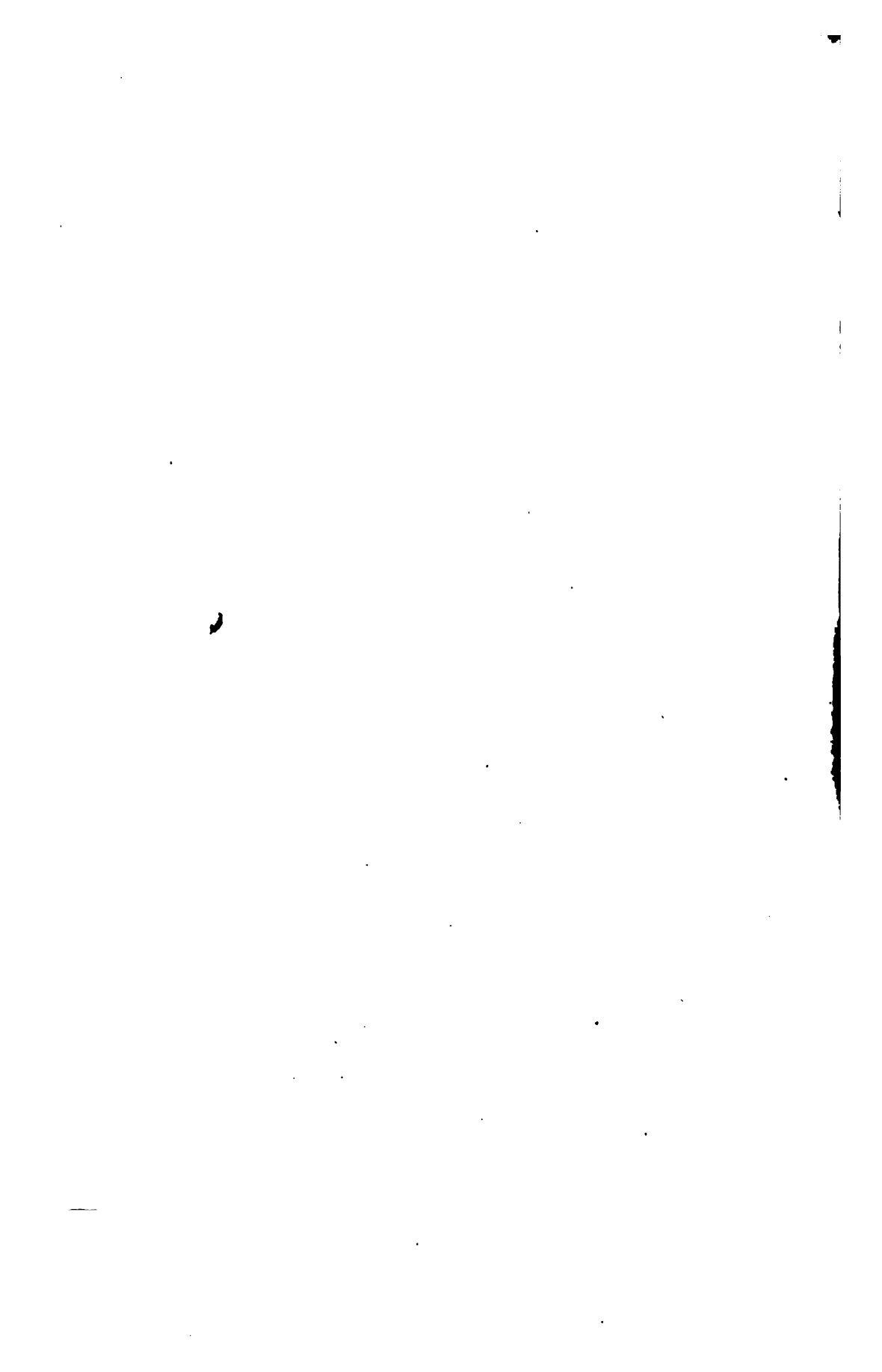
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P R E F A C E.

A short time previous to the departure of Sir William David Evans for India, I had the honour of becoming acquainted with him at Chester. He then was so good as to inform me that he had collected materials for a work on the Law of Landlord and Tenant; but that, having been recently appointed Recorder of Bombay, he was unable to complete it. He therefore suggested that my previous attention to a similar subject might enable me in some measure to supply his place; offering at the same time the use of the cases and observations which he had already collected. This suggestion, it is almost needless to say, I readily embraced; for it gave birth to the present treatise.

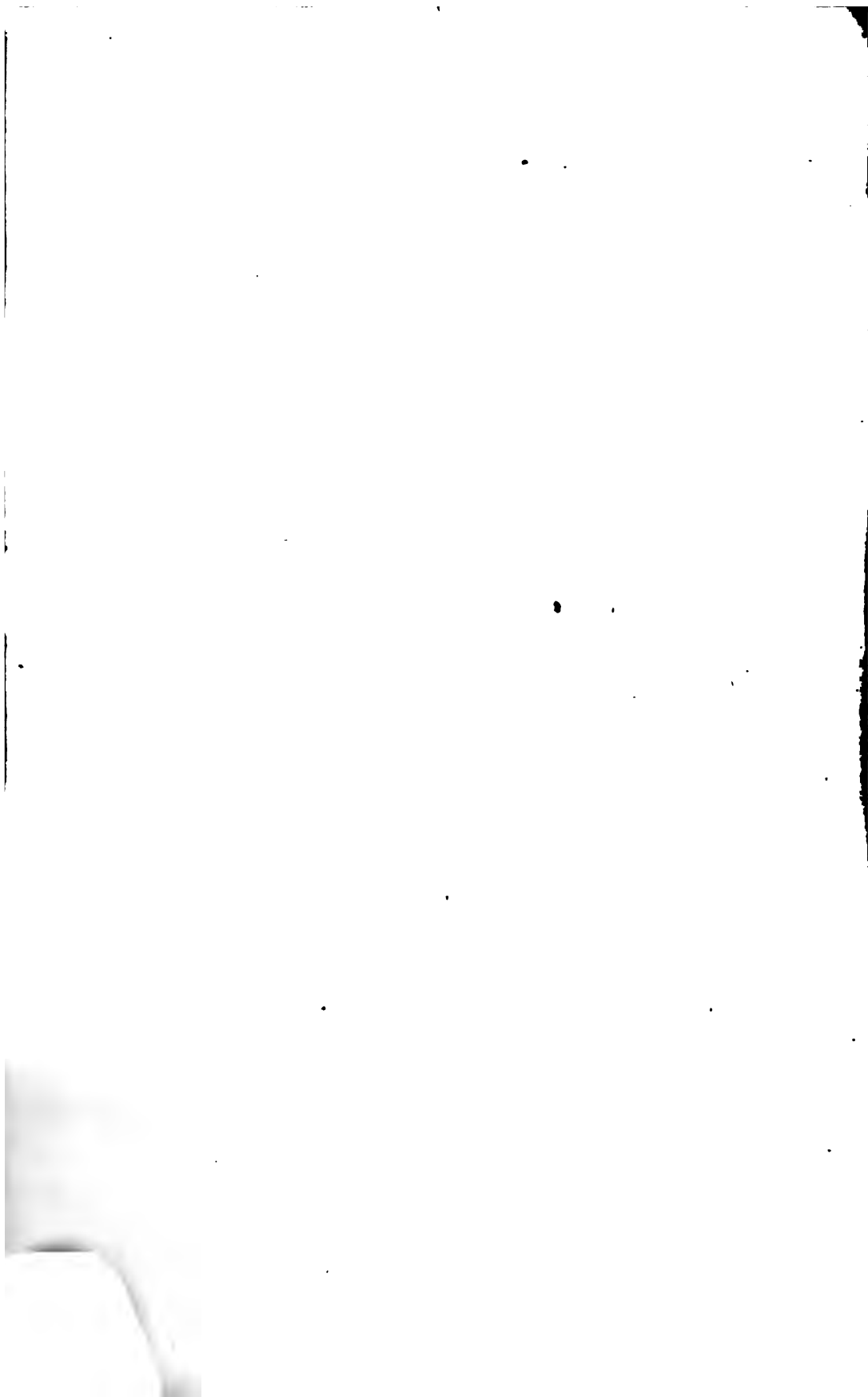
The profession will be naturally desirous to know in what manner I have turned this valuable assistance to account. Under the title "Agreements," accordingly, will be found many new and important questions discussed by my lamented friend in his usual judicious and masterly manner. I have endeavoured on all occasions, on which I have cited his authority, to give his very words; and I think the reader will recognise in most instances that vigour and independence of judgment which so pre-eminently distinguished Sir William David Evans from all other text-writers of modern times. It will likewise enhance the value of this part of the present volume, that the same questions have not been treated of by Mr. Sugden in his treatise on Vendors and Purchasers, the specific performance of agreements between Landlords and Tenants not falling naturally within the scope of his Work. Observations by Sir William David Evans occur under other titles, which I have enabled the reader to distinguish by prefixing to them the name of their author. For the remainder of the Work, and for the arrangement of the whole, I alone am responsible.

I have attempted to adapt my observations to the Law as it prevails in Ireland: but this must be considered only as an attempt; for the materials accessible to a stranger are scanty in the extreme. The books of Reports in Equity, with Gabbett's Digest of the Statutes, are the only assistances of which I have been able to avail myself.

I have not, however, omitted, when opportunities have occurred, to inquire for other sources of information; and although I have been unsuccessful with respect to the principal object of my inquiry, I am led by good authority to believe that there is little variation in Local Practice in that part of the Empire from the Law of England.

C. H. CHAMBERS.

Lincoln's Inn,
December, 13, 1822.



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A

TREATISE

ON THE

LAW

OF

LANDLORD AND TENANT.

Introduction.

THE relation of **LANDLORD** and **TENANT** may, for our present purpose, be considered in two points of view, either as arising from contract, or as depending on the principles of feudal tenure. In the former point of view, the contract is usually called a lease or demise. The subject matter is generally land, or something of an equally permanent nature. The parties to the contract are the owner of the soil and the farmer, who are sometimes called lessor and lessee, and sometimes landlord and tenant. By this contract the landlord grants to the tenant the possession of the land for life or lives, for a number of years certain, or at will. The tenant, on the other hand, usually engages by the same contract, to pay in consideration of such grant a certain sum of money, or other certain recompence, at stated periods, during the term, which payments are called rents. The parties may however dispense with rent, by agreeing to the payment of one entire sum on the completion of the contract, which is usually called a foregift or fine, it being the earnest

of the conclusion of the contract : it is also very common for the tenant to pay his consideration partly by way of fine, and partly by way of rent or annual payments. It must moreover be observed, that fines and rents are no essential part of the contract ; for there may be many beneficial considerations for granting a lease without reserving any rent or other recompence ; and if, from bounty to the tenant, the lessor chooses to forego all advantage to himself, it will be no objection to the grant, singly considered, that it is of a voluntary nature.

The relation of landlord and tenant is also intimately connected with the principles of feudal tenure : the words "tenant" and "tenement" derive their origin from that source ; and, notwithstanding the decay of that system, and the abolition of its more obnoxious parts, all lands in England are still said to be holden. In a general sense they are held of the king, the supreme lord, by whom they are supposed to have been originally bestowed, and to whom all as subjects owe the feudal duties of fealty and allegiance. But the nature of the feudal system was calculated to generate an infinite number of dependent tenures, often comprising the whole fee simple, on the grant of which the obligation of certain services to the feoffor or grantor was either expressed or implied. These services were acknowledgments of tenure, and, upon the failure of the conditions of the grant, either by failure of heirs of the grantee, or by the happening of any other contingency incident to such grants, the estate reverted back to the lord of whom it was held. After the statute of *Quia emptores*, (a) no *subinfeudations*, conveying the whole fee, could be made with a reservation of services to the feoffor. The feoffment therefore, in these cases, was an absolute alienation, but the restriction went no further ; on grants of interests of less magnitude a right of reverter has been always, and is at the present day, allowed to remain to the lord of the fee, and services are therefore permitted to be implied or reserved to the grantor and his heirs on such grants. The interest which thus remains in the grantor has obtained peculiarly the name of "the reversion," that is, the grantor has a right to the possession of the land whenever it shall become vacant by the determination of the estate in possession, which in

(a) 18 Edw. I. stat. 1.

technical language is usually called the particular estate. Lands are held, in a stricter sense than that before mentioned, of the reversioner, and he, his heirs and assigns, are entitled to the services due from every tenant to his lord. Perhaps it may be necessary to remark, that the word "heirs" is here used merely as a general denomination for all those who succeed by law to the estate of the grantor; and the doctrine applies equally to successors in the case of corporate bodies, or to personal representatives where the grantor has but a chattel interest. This secondary and incorporeal species of property, of which services are merely the manifestation, is concurrent with the estate in possession, and is capable of being granted in the same manner as the land itself. All the minor divisions of the reversion so granted, if immediate upon the particular estate, partake of the general nature of the ultimate reversion; or, in other words, the rights, incidents, and properties, of the ultimate reversioner may be delegated to the grantee for a definite period. In this point of view the immediate reversioner may be called the landlord, and the grantee of the particular estate the tenant; and the same terms may be applied through all the gradations of the fee, wherever the relation is of that immediate nature, that upon the determination of the particular estate next antecedent, the person in possession of the larger interest would be entitled to the benefit of the extinction of such antecedent estate. This immediate relation is likewise called a privity of estate, because each particular estate is supposed to be carved out of the estate of the immediate reversion: but no relation of this kind is permitted to exist where any intermediate interest intervenes, although, technically speaking, the parties may possess parts of the same individual estate in fee simple. The ultimate reversioner is sometimes called the landlord paramount or supreme, and the person in the actual receipt of the rents and profits of the land the tenant paravail, because he is supposed to make avail or advantage of the land. Whilst we are upon this point, it may be observed, that the notion of a remainder ought to be carefully distinguished from that of a feudal reversion. A remainderman may be entitled to the possession on the determination of the particular estate: but the particular estate is not held of him, nor is he entitled to the services in the mean time. He is entitled to the estate, merely

because it is the time fixed for his estate to commence in interest. But until the remainder takes effect, the particular estate is held of the reversioner, and services seem to be due to the reversioner, notwithstanding the extinction of the particular estate would not enure to his immediate benefit. (a) If the whole fee be parcelled out by way of remainder, there can be no reversion in the present and usual acceptation of the term. The tenure is then of the next superior lord, who by the long operation of the statute *Quia emptores*, and the extinction of mesne lordships, is now usually the king.

As estates tail before the statute *de donis* were in effect a species of fee simple, and in consequence of that statute they leave but a slight chance of reverter to the donor, they have never been the subject of contract between landlord and tenant. All particular estates however of less duration come under this denomination. Such are estates for the grantor's or grantee's own life, or for the life or lives of one or more other persons, estates for years and tenancy at will.

Estates for life, whether for the grantee's own life, or for the life or lives of one or more other persons, are freehold interests. They are assignable in their nature. At common law they are created by feoffment, to which livery of seisin is essential; they cannot consequently at common law be made to commence *in futuro*, because a livery of seisin must operate presently, or not at all. If an estate of this nature is made for any other person's life but that of the grantee, it is usually called an estate *pur autre vie*, and the person on whose life the duration of the estate depends is called *cestui que vie*.

Estates *pur autre vie* are not estates of inheritance, nor properly even descendible freeholds, as they have been sometimes represented to be; for before the statute of frauds, (b) if an action had been brought on the bond of the ancestor against his heir by reason of the possession of such estates, he might have pleaded "*riens per descent*." This peculiarity arose from the incident of occupancy to which they were liable at the common law. If the estate had been granted to the lessee without naming his heirs, and the lessee *pur autre vie* died during the life of *cestui que vie*, the possession was considered vacant at his death, and the

(a) But quære.

tute 7 W. III. c. 12 s. 12.

(b) 29 Ch. II. c. 3. s. 12. Irish sta-

person first entering after the death of the lessee became tenant *pur autre vie*; and in law he was called an occupant, because his title was by his occupying the possession when vacated by the death of the lessee. So if any person having entered by legal title as tenant to the lessee *pur autre vie* happened to be in possession at such a point of time, he became immediately an occupant, because the law cast the freehold upon him: neither was it necessary that he should claim as occupant; for it being for his advantage, the law forthwith adjudged him to be an occupant, although he might afterwards waive such a title. (a) The only exception to the law with respect to occupancy was in the case of the king; against whom there could be no occupancy, because no laches can be attributed to the king for not entering, where he may be entitled. This being the nature of estates *pur autre vie*, if the heir entered after the death of his ancestor, he took the estate not by virtue of his relationship, but as general occupant, and consequently was not liable to the specialty debts of his ancestor by reason of such general occupancy. If the heir had been named in the grant, this prevented, indeed, general occupancy; and upon the death of the lessee during the lifetime of *cestui que vie*, the heir was entitled to take as special occupant: but neither was he in this case chargeable at the common law on account of such property as having assets by descent, the circumstance of his being named in the grant being considered merely as a designation of the person who should take by occupancy in the event of the lessee's dying before *cestui que vie*. The statute of frauds, however, has made estates *pur autre vie* chargeable in the hands of the heir as assets by descent, if he takes by reason of a special occupancy; and if there should be no special occupant, the statute has directed that the estate should go to the executor or administrator of the lessee, and be assets in his hands for the payment of debts generally. Another statute (14 Geo. II. c. 20. (b)) has made them distributable as personalty where not otherwise disposed of, and where there is no special occupant. These estates, therefore, partake of the nature of personal estates, though not chattels: but they remain freehold for many purposes, such as a qualification to vote for members of parlia-

(a) Skelliton v. Hay, Cro. Jac. 554.
Holden v. Smallbrook, Vaugh. 187.

(b) There is no statute in Ireland to this effect. See 1 Gabb. Dig. 500.

ment, and to kill game; and a will devising them must be attested by three witnesses. (a)

A lease for years is a contract for the possession of land for some definite period of time; and in a general sense, all demises, whether for more years than one, or for one year, or for the fraction of a year, or for a month or week, equally come under the general denomination of a tenancy for years; for the same leading feature characterises all such tenancies, namely, the certainty of the time for which the estate is granted. Such leases, however, may be made determinable on some contingent event before their expiration by effluxion of time; for such condition of their duration is merely collateral to the term, which till the happening of such event is a term for years, for a definite period. In this way a term for years may be made determinable upon one, two, or more lives, which in such cases are considered as merely collateral to the term, and do not alter the denomination of the estate granted. Leases for years may be made to commence immediately, or at some future time; in both cases, however, the demise will be considered as a present disposition of the land, although in the latter case a qualified interest only, called an *interesse termini*, passes at the time of the contract, and no part of the estate is taken out of the grantor as far as affects the reversion, or the rights of third parties, until the estate commences in possession.

Terms for years are mere chattels, although, in contradistinction to moveable chattels, they are called chattels real: they are therefore incapable of being transmitted in ordinary cases by any words of limitation to those persons who are entitled to the succession in other cases of real property. The king, by his prerogative, is excepted out of this rule, and may take chattels in succession. The Chamberlain of London is said to be another exception: for by the custom of London, confirmed by several acts of parliament, he may take chattels in succession for the benefit of orphans: but it may be doubted whether this custom extends to leases for years, since the books (b) in which the custom is mentioned relate only to obligations and recognizances which are made to the chamberlain and his suc-

(a) 29 Cha. II. c. 3. s. 9. Irish stat. (b) Bird v. Welford, Cro. Eliz. 464;
7W. III. c. 12. s. 12. See Zouch d. Forse 682. Fulwood's case, 4 Rep. 65.
v. Forse, 7 East. 186.

cessors, by way of security for orphans' portions. In all other cases they vest by act of law in the executor or administrator of the lessee, as personal assets for the payment of debts; therefore if a lease for years be made to a man and his heirs, or to a bishop, parson, or any other sole corporation, and his successors; it will, notwithstanding, go to his personal representatives. (a) In the lifetime of the party, however, any disposition of his estate for years may be made which he chooses; and it may be useful, perhaps, to mention in this place, that if a tenant for life or years transfer all his estate to another, he transfers all his privity of estate; and the conveyance is called an assignment: if he transfer the possession for a less period than his own lease, it is called an underlease; and there is no privity between the underlessee and the reversioner, upon the principle which I have before mentioned.

All tenancies for life or years are subject to the feudal incident of forfeiture, of which, the reversioner is entitled to the benefit. A default of services, such as nonpayment of rent, was originally a cause of forfeiture. In these cases, however, the remedy by distress has been substituted by our law; or, in other words, the profits of the land may be seised as a pain to compel the performance of services without any forfeiture of the estate itself. At the present day the only causes of forfeiture are such tortious acts of the tenant as tend to the disherison of the reversioner, and which are necessarily the grossest violations of the obligations of tenure.

If the tenant for life or years, assign his estate to his landlord; or, in more technical language, if the tenant of the particular estate yield up his estate to the reversioner, it is called a surrender, and will cause an extinction of the particular estate in the reversion. If the reversion accedes to the particular estate, the same effect in most instances will be produced; and in that case the extinguishment is called a merger, or drowning of the particular estate in the reversion.

With respect to terms for years, it may be further observed, that they have acquired in modern times a fictitious existence in some cases, in consequence of the disuse of real actions, and the introduction of the mixed action of ejectment. Actions of ejectment were originally intended for the benefit of termor for

(a) Co. Litt. 9. a. 46. b. 90. a. 1 Rol. Abr. 515.

years to recover the possession, if expelled; and, indeed, they may be used for that purpose now: but they are now more commonly feigned actions, and our courts have moulded them into the most convenient form for trying titles to the freehold and the inheritance. The plaintiff is in such cases a fictitious person, who is supposed to be the lessee for years of the person claiming title. The tenant in possession is usually the defendant; and if he be a lessee for life or years, the reversioner may, on certain terms, be admitted defendant with him. The system is now well understood; the point of title to the freehold is raised, and in most cases is the only point permitted to be litigated. But, although the process is in so great a degree fictitious, yet the courts so far regard transactions of the same kind of a real nature that the lease by which the fictitious plaintiff claims must have in general all the requisites of a real lease.

A tenancy at will is the lowest species of estate which depends on contract: as the name imports, it is for no definite period; and although it may not be so expressed, it is essential that its continuance should be at the will of both parties. This kind of tenancy is a contract of so personal a nature, that it cannot be transferred; any attempt to do so on the part of the tenant will determine the tenancy, as well as any indirect act, such as treason or outlawry (*a*) in a civil action, which has a tendency to destroy the relation between the parties; so if the lessor is ousted, the tenant at will becomes tenant to the disseisor, the tenancy at will to the first lessor is determined. (*b*) So, if the landlord alien the reversion, or do any act inconsistent with the will, it is at an end. (*c*)

A tenancy at will is determined by the death of the lessor or lessee: but if the estate is made to two, or by two, the death of one will not determine the tenancy; (*d*) nor is such a tenancy determined by the marriage of a female lessor or lessee. (*e*)

By the custom of London a tenant at will under 40*s.* rent cannot be turned out of possession without a quarter's warning, and a tenant at will paying above 40*s.* rent shall not be turned

(*a*) *Doe d. Warren v. Fearnyside*,
1 Wils. 176.

(*b*) *Lockey v. Dumiloe*, Styl. 368.

(*c*) *Henchman v. Isles*, 1 Vent. 247.

(*d*) *Com. Dig. Estate H. 7. Co.*
Litt. 55.

(*e*) *Co. Litt. 55. Henstead's case*,

5 Rep. 10. *a. Crooke's case*, *Held. 72.*

out without half a year's warning. (a) This custom is said in another case (b) to have been proved by an ancient city book in French called "*Liber Albus*." The counsel for the plaintiff attended Holt, C. J. at his chambers, who told him he had consulted all the judges of England; and that Treby, C. J. was of his opinion, that the custom did not give the tenant a fixed estate to bar the landlord in ejectment: but gave a remedy, if disturbed, by collateral action. But the other judges, *contra*, who held that the landlord could not recover against such a tenant at will without half a year's warning.

It is said, that if the tenant at will rendering rent quarterly, determine his will in the middle of a quarter, he must pay a quarter's rent; and if the lessor do the like, he must lose a quarter's rent: (c) but if a tenancy at will is determined without any default in the tenant after he has sown the land, and before he can reap it, he is entitled to the crop after his occupation has ceased. This privilege, which is common to all tenancies, the termination of which depends on contingencies not in the power of the tenant to guard against, is called the privilege of taking the emblements, the word emblements being derived from the French words "*en blé*," in the blade. If the tenant determines the will by his own act, it will follow that he is not entitled to emblements. So if the determination of the lease is certain, and after the tenant has sown the land the lease expires before the corn harvest, the lessor shall have the corn, because it was the folly of the lessee to sow that which he knew he could not reap. If the tenant at will is outlawed, the king shall have the emblements: but if the lessor is outlawed, the tenant shall have them. (d)

In the case of *Timmins v. Rawlinson*, (e) the court said that leases at will in the strict legal sense existed only notionally; upon which Mr. Hargreave (f) remarks, that he presumes the observation means, not that the estate at will may not now arise as well as formerly; but only that it is no longer usual to create such estates, and that judges incline strongly against implying them. The point has, however, been recently discussed

(a) *Dethick v. Saunders*, 2 Sid. 20.

(d) *Oland's case*, 5 Rep. 116.

(b) *Taylor v. Seed*, Comb. 383.

(e) 3 Burr. 1603. 1 Bl. 533.

(c) *Layton v. Field*, 3 Salk. 222.

(f) *Co. Litt. 55. a. n. 3.*

in *Richardson v. Langridge*. (a) The defendant having built a shed on a plot of land, let the same by parol to the plaintiff, who was a carrier, upon an agreement, made without reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. This contract was ruled to be a strict tenancy at will. Sir J. Mansfield, C. J., with reference to the argument that a tenancy at will cannot now exist, said, "You must find some act of parliament, or some decision of the courts, that two persons cannot agree to make a tenancy at will. If two parties agree, the one to let, and the other to hold, as long as both parties please, it is a holding at will, and there is nothing to hinder them from making such an agreement." Heath, J. was of the same opinion; and observed, that it had been said, that an indefinite hiring of a servant was a hiring for a year: but the cases did not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year: but there is no custom, that if a man let premises to another, he lets for a year. Chambre, J. The taking of the dung by the landlord gave the tenant no term in the premises. A mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the courts have held this evidence of a taking for a year.

Sir W. D. Evans observes, that lettings analogous to that in the preceding case, he apprehends, are in practice very frequent, although, through their insignificance, they do not furnish often matter for judicial investigation. The letting of a piece of land for instance, for the purpose of growing a crop of potatoes, or other vegetables, for a gross sum, or a proportion of the profits, is very familiar; and may, perhaps, be reckoned without prejudice tenancies at will: for if the crop is sown, and the estate is determined by the lessor, the tenant is entitled to emblements, and the lessor cannot demand the rent without allowing the lessee the full benefit of his contract. The taking agistment for cattle is, with reference to the settlement law, a tenancy: but if the agreement is not for any certain time, it should seem that there is no more than a tenancy at will.

Tenant at sufferance is he who enters by lawful demise or title,

(a) 4 Taunt. 128.

and continues in possession after his estate is determined without agreement. Against the king there can be no tenant at sufferance; for the king being incapable of laches, such a person would become an intruder. So a guardian continuing in possession after the full age of the heir, is an abator, and not tenant at sufferance. The usual way in which this species of tenancy arises, is by tenants or lessees holding over after the expiration of their estates. If a lessee *pur autre vie* holds over after the death of *cestui que vie*, or the lessee for years continues in possession after his term, the law, rather than intend a wrong where their first possession was lawful, creates this kind of relation, in which the absence of the legal imputation of tort is the only circumstance which distinguishes it from any other unauthorised possession of the land. In former times, if the lessee so holding over paid rent according to the former contract, he became a tenant at will; and in the present day, under the same circumstances, the payment of rent would be presumptive evidence of his being a tenant from year to year, which species of tenancy partakes so far of the nature of estates at will, that it continues from year to year without any definite term as long as both parties please, subject to be determined by half a legal year's notice previous to the expiration of the current year. It is, however, to all intents and purposes a tenancy for a term of years, and is like other terms transmissible to representatives. (a) If a tenant at will holds over after the entry of the lessor, he is tenant at sufferance. (b)

There is no privity between the reversioner and tenant at sufferance; he therefore may be ejected without any notice to quit, or any demand of the possession of the land. (c) Which circumstance shews that this kind of possession scarcely deserves the name of tenancy; since in all other cases of tenancy for an indefinite time, such as tenancy at will or tenancy from year to year, either a demand of the possession in the case of tenancy at will, or a particular notice to quit, *viz.* half a year's notice ending with the year of the tenancy, in the case of tenancy from year to year, is requisite before the tenant in possession can be treated as a wrong-doer.

(a) *Doc d. Shore v. Porter*, 3 T. R. 13.

(c) *Butler v. Duckmanton*, Cro. Jac. 169.

(b) *Barham v. Hayman*, Dy. 173. a.

A tenant at sufferance in common cases is so far tenant that he may maintain trespass against strangers: but if the possession devolves to the king, his possession is vanished, and he cannot maintain trespass. (a)

In concluding our remarks upon this part of the subject, it may be observed, that the relation of landlord and tenant does not necessarily exist in many cases where the legal ownership is in one person, and the possession in another, although by the express compact of the parties. Therefore, although it has been sometimes said that a mortgagor in possession is tenant at will to the mortgagee, such an application of the term seems to be inaccurate and erroneous. Where indeed there is a clause that, until default of payment, the mortgagor and his heirs shall continue in possession, Sir W. D. Evans is inclined to think that it might be pleaded as a tenancy for years. (b) *A fortiori* it might be so pleaded, if it is specially provided that the mortgagor may retain possession for a number of years certain without redemption: but it would be nevertheless improper to confound the principles of such cases with the principles which govern the relation of landlords and tenants. (c)

With regard to the common case of a mortgagor continuing in possession after default in payment of the mortgage-money, no very precise notion appears to have prevailed, as to the nature of the relation between him and the mortgagee, till it became material to ascertain it in modern times.—In *Keech v. Hall*, (d) before Lord Mansfield, the mortgagor had leased the land subsequent to the mortgage; and it was ruled that the mortgagee might recover in ejectment against the lessee without notice to quit. In the course of the judgment, Lord Mansfield made the following observations:—The question for the Court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession; the mortgagee has given an implied authority to let, from year

(a) Tailor's case, Clay. 55.

(b) But see *Evans v. Thomas*, Cro. Jac. 172.

(c) See *Pausely v. Blackman*, Cro. Jac. 679. *Smartle v. Williams*, 3 Lev. 387. and *Watk. Conv.* 3d edit. p. 13. by Coote and Morley. *Holland v*

Halton, Carth. 414. *Bedo v. Saunderson*, Cro. Jac. 440. *Doe d. Titford v. Chambers*, 4 Camp. N. P. C. 1. *Murray v. Harding*, 2 Black. 859. *Roberts v. Trenayne*, Cro. Jac. 50.

(d) Dougl. 21.

to year, at rack-rent, or whether he may treat the defendant as a trespasser, disseisor, or wrong-doer. When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises as tenant at will, in the strictest sense of the word; and therefore no notice is ever given to quit; and he is not even entitled to reap the crops as other tenants at will, because all is liable to the debt; on the payment of which the mortgagee's title ceases. (a) The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage.

In *Moss v. Gallimore*, a subsequent case in the same book, (b) Lord Mansfield said, a mortgagor is not properly tenant at will to the mortgagee, for he pays him no rent. He is only so *quodam modo*. Nothing is more apt to confound than a simile. The mortgagor receives the rent by the tacit consent of the mortgagee: but the mortgagee may put an end to the agreement when he pleases. Buller J. In *Keech v. Hall* the Court did not consider the mortgagor as tenant at will for all purposes. Expressions, in particular cases, should be understood, with relation to the subject matter.

In *Birch v. Wright*, (c) in which the real point decided was, that the tenant of the mortgagor was tenant to the mortgagee, after notice given to him of the mortgage, Mr. Justice Buller expressed himself with reference to this point as follows:—That a mortgagor has often been called a tenant at will to the mortgagee in courts of law and equity is undoubtedly true; but I think inaccurately so: and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not resemble a tenant at will. In old cases he is sometimes called tenant at will, and sometimes tenant at sufferance. After adverting to *Keech v. Hall*, and *Moss v. Gallimore*, and referring to *Com. Dig. tit. Estate, l. H.* he said whenever it is necessary to decide a similar question between the mortgagor and mortgagee, it seems to me that it will be quite sufficient to call them so without having recourse to any other description of men, or to what they are most like.

(a) This is not the case, as the subject would be considered at law. Note by Sir W. D. Evans.

(b) Dougl. 279.

(c) 1 T. R. 378.

But if a likeness must be found, I think, as it was put by Ashurst, J., in *Moss v. Gallimore*, a mortgagor is as much, if not more like a receiver, than tenant at will. In truth, he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will, sometimes back to the time when the mortgage became forfeited; and no objection has ever been made on that account. He is not a receiver: for if he were, he should be obliged to pay all the rents and profits to the mortgagee, which is not the case. (a) Two things, which differ from each other in any respect, cannot be the same: therefore he is neither tenant at will nor receiver. Nor is it necessary that it should be so: for a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests, as well settled, as any in the law. The possession of the mortgagor is the possession of the mortgagee; and as to the inheritance, they have but one title between them. The mortgagor has no power of making leases to bind the mortgagee. He cannot, against the will of the mortgagee, do any act to dispossess him. (b) And the reason is, because the mortgagee, so long as he receives his interest, is virtually, and in the eye of the law, in possession. The mortgagee has a right to the actual possession whenever he pleases: he may bring his ejectment any moment that he will, and he is entitled to the estate, as it is with all the crops growing on it. He is also entitled to all the rents which have become due since his mortgage, and which are unpaid. (c)

Notwithstanding these distinctions, which appear to be sound and judicious, the same inaccuracy which has been so much animadverted upon is not unfrequent in practice, and in later cases in some of which the consequence of such assumption is most

(a) See *ex parte Wilson*, 2 Ves. and 3 Lev. 388. and *Skin*, 424. B. 252.

(c) *Moss v. Gallimore*, Dougl. 379.

(b) *Cro. Jac.* 680. *Cro. Car.* 304.

important, although the discussion would be irrelevant to our present subject. (a)

In *Thunder-d. Weaver v. Belcher*, (b) the assignee of a mortgage having recovered in ejectment without notice against tenant from year to year who had been let into possession after the mortgage, and before the assignment: on application to the court for a rule to shew cause for a new trial, it was contended that the defendant was at all events tenant at will or at sufferance; and no demand of the possession having been made by the mortgagee, nor any refusal by the tenant to attorn, (c) he could not be considered a trespasser, which he was assumed to be by the ejectment. Lord Ellenborough, C. J. said, "A mortgagor is no more than a tenant at sufferance, not entitled to a notice to quit; and one tenant at sufferance cannot make another." It must be remembered, however, that this was an expression used in refusing a rule to shew cause for a new trial, an occasion upon which, of all others, expressions are most frequently thrown out according to the impulse of the moment, and on which account such expressions ought least to be pressed as authority beyond the immediate point of decision. It must be recollected, that it is one of the incidents of tenancy by sufferance, that it is always held by wrong in opposition to a tenancy at will, which is always by right; and there is always sufficient assent of the mortgagee to the actual possession being held by the mortgagor, or his tenants, to prevent the imputation of such possession being wrongful, although it is held subject to the election of the mortgagee to put an end to it by immediate ejectment, without any previous formality of notice. With respect to this point, Sir W. D. Evans inclines to think that, in mortgage cases, a court would direct a jury to presume an actual assent to such a holding as regularly subsists between a mortgagor and mortgagee, notwithstanding any changes of property, which would have the effect of determining an ordinary estate at will. It is likewise to be noted, that a tenancy at sufferance consists in a wrongful continuance of the possession after the determination of a rightful estate held as tenant to another person: which rightful tenancy must be subsequent to the title

(a) See *Cholmondeley v. Clinton*,
2 Mer. 173. pp. 202, 205, 259.

(b) 3 East. 449.

(c) That is, to acknowledge the assignee's title.

of the mortgagee, and cannot be connected in any manner with the previous title of the mortgagor as owner.

So again in the case of a mortgagee in possession, holding over after he is satisfied, there is no tenancy either at law or in equity. The mortgagee is merely a trustee, and is bound to account for the balance and interest. (a) The Vice-Chancellor, in giving judgment in the case cited, observed, that a mortgage consisted of two things: a personal contract for a debt secured by an estate, and in equity, the estate is no more than a pledge or security for the debt: the debt is the principal, the estate is the accident. Whether the mortgagee is, or is not, in possession of the pledge, his right is precisely the same, with this difference, indeed, that he never has any right in equity to the estate, except as a fund to pay him his debt; for every other purpose the estate is the estate of the mortgagor; and when the debt is paid, all the mortgagee's right and interest in the estate ceases. He has then the legal estate only, and not a beneficial interest in it. If the mortgagee has chosen to take possession, and help himself, he then becomes a bailiff without salary, and is accountable for the profits which are applicable in the first instance to pay the principal and interest of his debt, and all other allowances to a mortgagee: but he is bound to be an accounting party, taking the estate in possession upon the principle and upon the obligation to account with the mortgagor for all the rents he receives. All the cases treat the mortgagee, as soon as he is paid, as becoming a mere naked trustee holding the legal estate for the benefit of *cestui que trust*, the mortgagor.

A servant put into the occupation of a cottage, with less wages on that account, does not occupy as tenant: but his occupation is the occupation of the master; and the master may declare upon it as his own occupation; nor was it considered material in this case that the cottage was divided into two parts, one only of which was occupied by the servant, and the other by a tenant paying rent. (b) The same point has also been so decided in the case of burglary. (c)

Where a purchaser is permitted to take possession before the completion of his contract, or where a lessee enters into posses-

(a) *Quarrell v. Beckford*, 1 Madd. Ch. Ca. 269.

(b) *Bertie v. Beaumont*, 16 East. 22.

(c) *Rex v. Stock*, 2 Taunt. 299.

sion under an agreement which is in some degree a similar case, it is difficult to say what relation exists between the parties.

In a case (a) at *Nisi Prius*, before Lord Kenyon, where, after the contract had failed for want of title, the vendor brought an action for use and occupation, the usual form of action at the present day for the recovery of rent or an equivalent for rent on implied contracts, and it appeared that the vendee had expended a large sum of money in improving the premises, Lord Kenyon held, that the plaintiff could not recover, because it appeared that the occupation had not been beneficial to the vendee.

In *Kirtland v. Pounsett*, (b) it appeared that the defendant (the purchaser of certain premises) having paid his purchase money, was permitted in July to occupy the premises. In the month of October following, the plaintiff not having made out a good title, the defendant declared that he rescinded the contract. He accordingly quitted the premises, and brought an action for money had and received, and recovered back from the vendor the whole purchase money, and the expenses of investigating the title. The vendor then brought this action (for use and occupation) to recover rent for the space of time during which the defendant had occupied the premises. Best, Serjt. and Selwyn, contended for the defendant, that there was no contract, either express or implied, in this case: that the statute, (c) which gives the action for use and occupation, requires that some contract of demise should subsist; and that the contract of sale, which was proved, by sufficiently accounting for the possession of the premises, disaffirmed the existence of any other contract. They urged the case of *Hearne v. Tomlins*, above stated: but *Espinasse* contra, observed that Lord Kenyon limited his position to the case where the occupation of the house was not beneficial. Mansfield, C. J., at the trial at first inclined to think that the action might be supported: for that if a man had contracted for the purchase of an estate of the annual value of many thousand pounds, and had through the imprudence of the vendor been permitted to take possession which he might possibly retain for several years, pending a discussion of the validity of the title in a court of equity, it would be strange if the pur-

(a) *Hearne v. Tomlins*, Peake. N. P. C. 192.

(b) 3 Taunt. 145.

(c) See post. tit. Use and Occupation.

chaser could hold the possession, and receive the profits during all that time, without paying any consideration for it to the vendor. But upon the ground that, during all the defendant's occupation of the premises, the plaintiff had been in possession of the purchase money, of which he had made, or might have made, interest, the Chief Justice directed a nonsuit, with liberty for the plaintiff to move to set it aside, and a verdict entered for the plaintiff, with 8*l.* 1*s.* 2½*d.* damages, being the amount of the difference by which the jury found the reasonable value of the house during the defendant's occupation to exceed the interest of the purchase money, computed for the time during which the money was in the defendant's possession. Accordingly, Shepherd, Serjt., moved for a rule nisi, contending that where a purchaser is let into possession in pursuance of a contract, if that contract is rescinded, and the parties are remitted to their original situation, an undertaking to pay rent arises by implication of law. Mansfield, C. J. "I doubted extremely whether in any view of the case the plaintiff could recover for the occupation of the house. If no money had been paid, perhaps it might be a different question: but if a man pays part of his money, and is so unwise as to take possession without a title, is it not just that the one party should take back his money, and the other take back his house? It is impossible to make the rules of law depend on the balance of loss or gain in the transaction. The possession of a house is always beneficial, for it protects the occupier from the inclemency of the weather. A contract cannot arise by implication of law under circumstances, the occurrence of which neither of the parties ever had in their contemplation." The Court held unanimously that the nonsuit was right, and refused the rule.

These are the only two cases at law which bear upon the subject, and neither of them are satisfactory as to the point immediately before us. The case before Lord Kenyon, at *Nisi Prius*, is not distinct enough to be of much weight; and in *Kirtland v. Pounsett* it seems evident that it might be admitted that the vendor had no title to recover in the action, without assenting to the dictum of Sir J. Mansfield, that no implied contract could have existed under the circumstances. In a legal point of view the purchaser had no title to the possession, except by permission of the vendee; and it seems clear that the

vendor, notwithstanding such permission, might have brought ejectment against him, although not without first demanding the possession. (c) That something like a tenancy at will, if not a tenancy at will, subsists between the parties under such circumstances it seems scarcely possible to deny; and this notion seems to be confirmed by the old law in the case of feoffments, where, according to Littleton, (d) if livery was wanting, and the feoffor notwithstanding, delivered the deed to the feoffee, he might enter and occupy at the will of the feoffor, delivering of the deed being construed into a permission to occupy, although the deed could not operate so as to pass the interest intended for want of livery. With respect to the principal point in *Kirtland v. Pounsett*, the proper remedy in such cases seems to be in a court of equity, which will, upon the motion of the vendor, set an occupation rent on the premises, if no money has been paid; and if a deposit has been paid, 4l. per cent. interest on the deposit will be deducted out of such rent. (e)

It is not necessary, however, in the form of action used in the cases last cited, that the precise relation of landlord and tenant should be made out, if there be in point of fact an ownership on the one hand, and an occupation on the other. For in a recent case, (f) where it appeared that the defendant had agreed to sell some freehold property to A., and A. immediately afterwards sold the property by public auction in lots, of one of which lots the plaintiff became the purchaser, and took possession, and afterwards the original vendor (the defendant) refusing to perform his contract, A. brought a suit in equity for specific performance, pending which the defendant obtained possession from the plaintiff, on a misrepresentation that A. had failed in his suit,—upon A.'s ultimately succeeding in equity, it was held that the plaintiff might maintain the action for use and occupation against the defendant (the original vendor) for all the time during which he held the possession so obtained from the second purchaser. The cause was tried before Mr. Justice Holroyd, when that learned judge, holding that the action could not be maintained under the circumstances disclosed in evidence, non-

(c) *Right d. Lewis v. Beard*, 13 East. 618. *Dyer v. Hargreave*, 10 Ves. 310.

(d) *Scol.* 68.

505.

(f) *Hull v. Vaughan*, 6 Price, Exch.

(e) *Smyth v. Lloyd*, 1 Madd. Ch. Ca. Rep. 157.

sued the plaintiff. The court of exchequer set aside the nonsuit, upon the principle before stated. In this case Baron Graham observed, that in questions which have reference to the act of parliament, (g) it was quite clear that a distinct relationship of landlord and tenant should be established : but this case might stand on principles of common law, as recognized by all the cases, both old and new. My difficulty, said his lordship, has been to reconcile that rule with the case of *Kirtland v. Pounsett*, where the Chief Justice has certainly expressed himself very strongly against the implication of an assumpsit, where it was not in the contemplation of the parties. Wood, B. Vaughan (the defendant) got possession by the effect of a misrepresentation of the state of things as between him and A. Whether there was fraud in that, or only a mistake, makes no difference. It was in fact, by the permission of the plaintiff, that he was let into possession. Then the contract between the defendant and A. was at length discovered not to be at an end, but to be still in force against the defendant ; and he accordingly once more delivers up possession of the land, and executes a proper conveyance. Then the plaintiff makes this demand for use and occupation ; and the defendant resists it on the ground that there was no agreement between him and the plaintiff to hold on such terms as would entitle him to maintain this action. Will the law permit such a defence ? Certainly not : for it implies in such a case a tacit promise that he will satisfy the plaintiff for the use and occupation had. The form of the declaration in this case is material ; and as this has been drawn, laying the holding by permission and sufferance, it is sufficient to meet the facts in proof in the present instance, and to maintain the action which has been properly founded on these circumstances. The sufferance is alleged and proved. He was suffered to take possession in consequence of a mistake certainly : but when that mistake is discovered, the defendant must do the plaintiff justice.

In this case it must be confessed, the decision of the Court met the justice of the case ; and, as it was peculiar in its circumstances, no general rule was violated : but it ought to be observed, that the doctrine of an equitable title prevailing in this form of action bears no analogy to the case before the Court, but is founded upon a very different principle. In this case the

(g) See post. tit. Use and Occupation.

equitable title was allowed to prevail against the legal title: but in ordinary cases the law merely gives a preference to the person possessing an equitable title, not against the person possessing the legal title, but against a person claiming possession under such equitable title as tenant.

If the contract be rescinded, the possession of the vendee seems to bear a strong resemblance to that of a tenant at sufferance. So if the contract of sale is conditional upon the vendee's paying the consideration within a limited time, and he fail to do so, the vendee is nothing more than tenant at sufferance, and may be ejected without notice. (*h*)

If a man enter upon the occupation of premises under an agreement for a lease, it is clear that an action for use and occupation will lie, because it cannot be supposed that the lessor has received an equivalent, as in the case of vendor and vendee, of which he may make profit in the way of interest to counterbalance the loss of the profit of the land: but, in the point of view in which we are now considering the subject, there is no distinction between the two classes of purchasers; namely, the purchaser of the whole, and the purchaser of a qualified interest only in the premises, such as a lessee may be considered to be.

In *Hegan v. Johnson*, (*i*) the tenant had been admitted to the possession under an agreement, and had been in possession for three quarters of a year. The landlord distrained for rent, by which conduct he must be considered as having assumed the existence of a tenancy, and the tenant brought the usual action of replevin in which the point of tenancy arose. The Court asked whether (the lessor) could distrain at all under such an agreement. The occupier, they said, certainly did not become tenant from year to year at the beginning of the first month, or first three months: for clearly at any time before the end of the first year, if a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit; and if he had executed it, he would thenceforth have held, not under the supposed demise, but under the lease. When a person is so foolish as to enter upon the premises under an agreement for a lease without a stipulation,

(*h*) *Doe d. Leeson v. Sayer*, 3 (*i*) 2 Taunt. 148.

Campb. 8.

that in case no lease is executed he shall hold for one year certain if he does not execute, the landlord may turn him out without notice. The effect is, the lessor cannot distrain for the rent; he must bring his action.

Upon this case, Sir W. D. Evans observes, that from what has passed in other cases, the proposition that the tenant might be ejected without notice, must be understood only to mean without notice of six months, and not without any notice at all. Taking the proposition in this qualified sense as correct, and the doctrine of it seems essentially involved in the decision of the case, the tender of a lease would be immaterial as a question of law, the legal interest being only an estate at will; and a court of law, according to the present course of practice, could not advert to the equitable remedies of a suit for specific performance and injunction. But it may be a question whether the tender of a lease, and a refusal to execute it, would not, under the circumstances, amount to a determination of the will, and turn it into an estate at sufferance, in which case the inference would be right, that the tenant might be ejected without notice.

It is a clearer case where (*k*) a man gets possession of a house without the privity of the landlord, and afterwards they enter into a negotiation for a lease, but differ about the terms, that there is no tenancy: for here the first occupation was unauthorized; and the contract being rescinded, the possession continues to be unauthorized, and may be treated accordingly. It may further be observed, as an inference from the abovementioned case of *Hegan v. Johnson*, that there seems to be no ground for considering such an occupation under an agreement as any thing more than a tenancy at will, even after the actual payment of rent; because, when the circumstances under which such payment was made are disclosed, they repel the inference which *primâ facie* would arise from that circumstance.

When after the statute *de donis* the feudal possibility of reverter after a gift in tail was converted into an absolute reversion in the donor, the policy of the feudal law obliged the tenant in tail to perform the same services to the donor for

(*k*) *Doe d. Knight v. Quigley*, 2 Campb. 505.

which the donor was answerable to the lord paramount. But the law never made the same implication on grants for lives or years; and, therefore, if the lessor makes no reservation of services, the law exacts none, except fealty, which every tenant having a determinate interest in land must do, if required, as a manifestation of tenure. It is no longer, indeed, the practice to exact it: but the title to fealty still appears to remain, and for compelling the performance of it the law has provided the remedy by distress, which is an inseparable incident to all services due by tenure; and in the case of fealty cannot, as it is said, be excessive. (l) It will follow, therefore, that a rent, or as it is sometimes called a rent service, not because a rent is a service, but because it is in lieu of service, is not a necessary part of leases for lives or years, considered with reference to the principles of tenure: neither is it so with respect to mutuality of contract; for, from favour or for valuable consideration given at the time of making the lease by way of fine or foregift, leases may be made without reserving any rent. Rents, however, have been considered at all times a convenient mode of apportioning the payment of the consideration agreed to be given by the lessee for the enjoyment of the land. In the case of leases by the crown, and all corporate bodies, it is usual to give the tenant in possession the option of renewing upon the payment of a fine, without varying the rent at each letting: the reserved rent has accordingly, in such cases, obtained the appellation of the ancient rent. Where no fine is paid, and the premises are let at the full rent, which the tenant is capable of affording, the rent is called a rack-rent. (m) The improved rent is only a term in common parlance to denote either that the old rent has been raised or improved, or that the rent reserved on an underlease is greater than that which the lessee pays to the original landlord: and the lessee in such case is said to be the owner of the improved rent.

Rent, being in the nature of services, is said technically to issue only out of corporeal hereditaments; because the only remedy given by the feudal law for default of services was by distress, and distress could only affect corporeal hereditaments. In process of time, however, it became convenient to grant in-

(l) Co. Litt. 69. b. n. 5. Sull. Lect. (m) Wood's Inst. 194.

corporeal hereditaments by way of demise : rents were reserved on such contracts ; and although they could not be said to issue out of the hereditaments granted, an action of debt was permitted for rent arrear on such leases. (n) Advowsons, commons, (o) tithes, (p) liberties, fairs, markets, franchises, and other things of a like nature, are frequently demised, and annual payments for the engagement of them have acquired the denomination of rent. All corporeal hereditaments have, therefore, always been the proper subjects of demise : incorporeal hereditaments also, where they have been appendant, appurtenant, or incident to corporeal hereditaments, have also been always deemed demiseable, together with their principals, although the rent could issue only out of the corporeal hereditaments to which they were annexed. But in modern times incorporeal hereditaments may be considered demiseable in gross, with some few exceptions.

Commons, for instance, admit of some distinctions. A common may be appendant, as well as an advowson : but although an advowson appendant is severable, and may be granted in gross, a common appendant which is of common right, and peculiar to arable land, is not so ; for it was given by the law for beasts which serve for the maintenance of the plough, as horses and oxen, and to dung and compester the land as kine, sheep ; and, consequently, none can have common appendant, but he only who has the land to which such common is appendant. But there seems to be no objection to the occupier of land, or a messuage to which common is appurtenant, granting it in gross for life or years : but a common appurtenant for all beasts, levant and couchant, seems to be inalienable from the land, because the condition which limits it is inseparable from the occupation of the land to which it is appurtenant. Commons in gross may be demised in the same way as all other incorporeal hereditaments in gross. (q) Common *pur cause de vicinage* cannot be considered as grantable : for, in effect, it is only an excuse for trespass in uninclosed countries, and is not founded on any kind of right. One person may enclose against another, though such a common has existed time out of mind ; and it can

(n) Bro. tit. Lease, 110.

(p) The Dean and Chapter of Windsor v. Gover, 2 Saund. 303.

(o) Whiteman v. King, 2 H. Bl. 4.

(q) 3 Salk. 94.

3 Salk. 94.

(q) 3 Salk. 94.

only happen where beasts escape from one person's land into another's by reason of vicinage. Offices also admit of some distinctions. Those of a public judicial nature, and to which the personal character and capacity of the individual exercising it is the sole qualification, cannot be exercised by deputy, and consequently are not grantable to any other person. There are other offices of great trust, but of a ministerial kind, which cannot be granted *pur autre vie*, or for years, on account of the numerous inconveniences which might be occasioned to the public by the death of the lessee: but grants of such last mentioned offices for the life of the grantee, or for years, determinable on his life, with a condition that he shall exercise the office in person, seem not to be liable to the same objections. (r) In this way the offices of custos brevium, chirographer, clerk of the pipe, of the king's silver, or of the crown office, remembrancer, or chamberlain of the exchequer, prothonotaries in the several courts of justice, may be granted. The same restriction will apply to the office of warden of the Fleet, or any other gaolership. (s) The office of goaler to the Gatehouse prison in Westminster was formerly considered an exception. The dean and chapter of Westminster were the immediate grantees in fee of the crown, and were perpetual gaolers themselves: and it was their practice to lease for years, taking a security at the same time from the lessee for their own indemnity. The Gatehouse prison, which was situated in the sanctuary, Westminster, has long ceased to exist; and the bridewell, Tothillfields, has been substituted in its place. (t) The office of marshal of the Marshalsea of the King's Bench having been revested in the crown by the stat. 27 Geo. II. c. 17. is by that act made inalienable by the patentee of the crown. The same statute has extended the restriction to all inferior officers in that prison.

It appears by the recital of the stat. 2 Edw. III. c. 12. that it was anciently the practice to assess the different counties in England, to a certain farm or payment, for which the sheriff was accountable; and the hundreds and wapentakes were included in

(r) *Phelps v. Wincombe*, 1 Roll. Sutton's case, 6 Mod. 57. *Meade v. Rep.* 274. *Ellis v. Ruddle*, 2 Lev. 151. *Lenthall, Cro. Car.* 587. *Rex v. Lenthall*, 3 Mod. 145.
Nelson's case, 1 Freem. 428. See also
 stat. 5 & 6 Edw. VI. c. 16. s. 2.

(t) *Rex v. Lady Broughton*, T. Raym. 216.
 (s) *Reynolds's case*, 9 Rep. 95. a.

this assignment, as parcels of their respective counties. The sheriff likewise frequently made a profit by letting his county or the bailiwicks of hundreds and wapentakes, at an increased farm: but by the stat. 14 Edw. III. s. 1. c. 9. it was provided that the sheriffs should hold the wapentakes and hundreds in their own hands, and put in such bailiffs and hundredors, having lands within the bailiwicks and hundreds, for whom they would answer; and if they would let any hundreds, bailiwicks, or wapentakes to farm, they should let the same at the ancient rent, without any increase. It has, however, been provided since that time by the stat. 23 Hen. VI. c. 10. that no sheriff shall let to farm in any manner his county, nor any of his bailiwicks or wapentakes; and on the principle of this statute Lord Hardwicke refused to permit the keeper of a house of correction to assign over the profits and fees of his office, observing that, although this statute mentioned only sheriffs, it extended to all such mischiefs. (a)

On the other hand, the king cannot grant a hundred so as to exclude the sheriff from executing his office and duty of sheriff in executing writs in his county. The petty leets, and courts baron of hundreds, were originally derived out of the sheriff's county court or toun, which had consequently a general superintendance over them: but since hundreds were considered as of common right belonging to the king, independent of counties, the king made grants of them in fee simple for life or years. By the statute, however, of 2 Edw. III. c. 12. all hundreds let to farm by the then king for life, or otherwise, were annexed again to the counties; and it was thereby declared that they should not be severed from them for the future; and by a subsequent statute (x) all hundreds and wapentakes which had been severed from their respective counties, except such as had been before that time granted in fee simple, were rejoined to the same counties. (y)

In a late case, (z) an assignment to trustees of all the emoluments and profits, which during the life of A., and his continuing to hold the office of clerk of the peace, should arise in respect of such office, after deducting the salary of his deputy upon trust

(a) *Methwold v. Welbank*, 2 Ves.

339. See *Dallantine v. Irwin*, Fortes.

368.

(x) Stat. 14 Edw. III. s. 1. c. 9.

(y) 4 Inst. 267.

(z) *Falmer v. Bate*, 2 Mercl. & B. 473.

for creditors, and from time to time to pay the surplus to A., was held to be invalid. It was not contended that the office was saleable: but from the decision of the Court (by certificate to the Vice-Chancellor,) it may be inferred that they thought there was no distinction between the sale of the office, and the assignment of the profits. The office of clerk of the peace is regulated by two statutes. The stat. 37 Hen. VIII. c. 1. s. 3. gives the nomination of clerks of the peace to the *custos rotulorum*: and by the stat. 1 W. and M. c. 21. s. 5. a residence in the county is required; and by both it is enacted that the office may be executed by deputy, to be approved by the *custos rotulorum*.

Where an office is not of a public nature, there, although it is a judicial office, such as the stewardship of a court leet, a lease for years of such an office, determinable on the death of the lessee, has been held good. (a) *A fortiori*, such offices as do not concern the administration of justice, but which only require manual skill and diligence, may be so granted, or for life or years, absolutely, because they may be well exercised by deputy. (b)

Hereditary offices, and dignities granted by the crown, *honoris causa*, or as a reward of services, are merely personal, and are not alienable by the grantee, although they come under the denomination of hereditament. The dignity of earl, indeed, has been also determined to be a tenement, on account of its relation to the earldom; (c) the original mode of creating which was by charter, granting him the third penny of the earldom or county from which he derived his title, (d) the counties, as has been already mentioned, being at that time assessed at a certain farm or payment to the king. (e) The ancient land honours or baronies also might be called tenements, of which kind of dignity only one remains at the present day, viz. the earldom of Arundel, attached to the honour and castle of Arundel, in Sussex, and enjoyed by the dukes of Norfolk. But since the conferring a dignity is an act of regality, such dignities seem not to be alienable, though they have something of a corporeal nature. It is almost superfluous to add, the earls of Arundel may, like other proprietors, lease the possessions of their barony for the purpose of agricul-

(a) Howard v. Wood, 2 Lev. 245.

(c) Nevil's case, 7 Rep. 33.

(b) Jones v. Clark, Hard. 46. Veal

(d) Mad. Bar. Angl. 137.

v. Prior, Hard. 351. The City of
London v. Hatton, Styl. 357.

(e) Stat. 2 Edw. III. c. 12.

ture and good husbandry, without any licence or permission from the crown. (f)

Although goods and chattels are said to be demiseable, the term seems to be rather inapplicable to such contracts. Since, however, in the leases of farms and houses, it has been found convenient to include the live stock, and the farming implements on the land, and the furniture or other chattels attached to the house in the contract, they have acquired to a certain degree demiseable qualities; yet the interest which passes to the lessee is extremely different from that which is transferred by a lease of lands, houses, or other hereditaments. Although the lessee has only the use and profits of such moveable chattels during the lease, and is restrained from selling or giving away any part of them during the term, yet the lessor is considered as having a reversionary interest of so precarious a nature, that it is accounted in law a mere possibility. No lease or grant can consequently be made of them after a lease in possession; and, in the case of live stock, the absolute property of such as die vests in the lessee, as well as all the young ones coming from them, such as calves, lambs, and other produce, which are considered as profits severed from the principal in compensation of the rent paid by the lessee: neither is the succession of young ones to be resembled to the succession of members in a corporation aggregate; for the lease being a demise of certain individual cattle, the possibility of reverter when they die is at an end. In the lease of stock, with the lambs, calves, &c. accruing during the term, at the end of the term, the increase shall belong to the lessor. So in the case of a lease of dead goods, if any thing is added by way of reparation or ornament, the increase will belong to the lessor. (g) In the lease of houses, with the goods they contain, it is usual to annex a schedule of the articles to the lease, and to insert a covenant in the lease from the lessee to redeliver those specific articles; and without such a covenant a lessor is said to have no other remedy for the recovery of them after the lease ended, but trover and detinue. (h)

(f) See *Mad. Bar. Angl.* 23.

(g) *Wood v. Ash*, Owen 139.

(h) *Wood and Foster's case*, Godb.

112. *Spencer's case*, 5 Rep. 16. b.

CHAPTER I.

ON THE QUALIFICATIONS OF LESSOR AND LESSEE.

IN the present Chapter, it is my intention to consider the qualifications which the law requires in the contracting parties to enable the one to grant, and the other to accept the lease.

The power of the lessor includes two considerations ; one of which is preliminary to the other. 1. It is necessary to inquire what are the requisites to enable him to grant at all. 2. What quantity of interest the nature of his estate enables him to grant. If he has no power legally to grant at all, this affects the lease *ab initio*, and makes it void altogether, even against himself, except in some particular cases, which shall be mentioned. If his interest be limited, or his power defeasible, a lease is only void or voidable on the event of his interest determining before the expiration of the lease, or on the extinction of his right to the estate by the establishment of another person's better title.

1. Freehold leases at the present day may be created either by some conveyance operating by force of the statute of uses, in which case livery of seisin is not requisite; or it may be made in the old way at common law, by feoffment and livery of seisin. In the first case the lessor must have a seisin of the freehold, because no minor interest is sufficient to serve the uses ; and in the other case the livery of seisin requisite to a feoffment will of itself work a disseisin if the lessor previously had no right to the freehold ; so that in all cases a freehold lease implies a seisin of the freehold in the lessor, either tortiously or by right. But for the creation of a lease for years, or at will, nothing more is requisite than that the lessor should have the possession. The possession for a single day will enable him to make a valid contract for years : (a) but without such a possession the lessor will be just as much liable to an action on the stat. 32 Hen.

(a) *Wilson v. Field*, Cas. temp. Holt 555.

VIII. c. 9. against the selling pretended titles for making a lease for years, as for any greater estate. (b)

Where one intrudes on the possession of a farmer of the king, although the king is not put out of the freehold, yet the term is turned to a right, and the intruder may make a lease for years, upon which his lessee may maintain ejectment. (c) Such a lease is good against all except him who has right, on account of the respect which the law always pays to the notoriety of apparent possession; the right to the possession being always *primâ facie* in the person having the actual possession till the contrary be shown. So a disseisor or other wrong-doer may make a lease for life or years, which shall be good against all the world, except the disseisee, because the disseisor has a rightful freehold and possession against all but the disseisee. (d) But it will follow likewise that the rightful owner cannot make a lease either for life or years, when he is out of possession. If, therefore, a disseisee intended to make a lease, he must enter or authorise another to enter in his name; and he must make the lease during the continuance of his possession: for if there is no actual expulsion of the disseisor, or if the disseisor regain possession before the execution of the lease, this will operate as a new disseisin, and thus the seisin and possession requisite will be wanting at the time of making a lease. (e) The heir, indeed, after the death of his ancestor, may make a lease before actual entry: but that is because a seisin and possession in law is cast upon him immediately after the death of his ancestor, and none has seisin or possession in fact. But if a stranger enters by abatement, then the lease made afterwards by the heir, unless after actual entry and possession taken, will be void, because the entry and possession in fact of the stranger divests the seisin and possession of the heir. (f)

At the common law in all feoffments and grants some act was necessary upon the part of the feoffee or grantee to signify his

(b) *Partridge v. Strange*, Plow. 78.

Litt. 369. a. Vin. Abr. Estate R. a.

(c) *Thurston's case*, Ow. 16. *Lee v. Norris*, Cro. Eliz. 381. *Anon.* 3 Leon. 206. pl. 265. *Leigh's case*, Owen. 15.

(e) *Jennings v. Bragge*, Cro. Eliz. 446. Co. Litt. 48. b. *Stephens v. Elliott*, Cro. Eliz. 483. *Doe d. Duckett v. Watts*, 9 East. 47. *Page v. Jourdan*, 1 Leon. 122.

(d) *Slywright v. Page*, Gouldsb. 101. *Gerrard v. Worsely*, Ry. 874. a. Co.

(f) *Henley v. Brice*, Moor. 546.

acceptance of the estate granted. In most cases the exercise of any possessory right implied such acceptance; but if livery upon a feoffment had been only within view, that is without actually going upon the land and making delivery of the actual seisin and possession whilst there, no interest passed to the feoffee till entry in the lifetime of the feoffor; before such entry, therefore, the feoffee could make no lease. (g) So no underlease can be made by a lessee till actual entry and possession taken by virtue of his contract in all leases made at the common law without the aid of the statute of uses; (h) because actual entry is necessary in those cases to complete the transfer; for although before an entry an *interesse termini* passes to the lessee, which is assignable, yet nothing substantially passes out of the lessor so as to vest a particular estate in the lessee, or to create a reversion in the lessor.

If, however, the conveyance to the grantee operate by the statute of uses, either by transmutation of possession, or otherwise, no entry is requisite to vest the use in the grantee, because it was the object of the statute to supersede the necessity of such entry; and although some sort of acquiescence in the grant is requisite on the part of the lessee, as in all other cases, the exercise of a possessory right may well be considered to imply it.

If the conveyance be by bargain and sale enrolled, no lease can be made before enrolment, because, by the construction put on the statute (i) of enrolments, nothing is in the bargainee before enrolment; although after enrolment the bargain and sale will have relation to the deed so as to avoid all mean incumbrances of the bargainor, and to entitle the wife of the bargainee to dower. (k) The statutes of enrolments by the express saving of those statutes do not extend to lands within any city, borough, or town corporate, wherein the mayors, recorders, or other officers, have authority to enrol deeds: in the places excepted, therefore, the law must be governed by the particular

(g) 1 Rep. 156 a. Co. Litt. 48. b.

(h) Stat. 27 Hen. VIII. c. 10. Irish stat. 10 Char. I. c. 2. s. 1.

(i) Stat. 27 Hen. VIII. c. 16. Stat. 5 Eliz. c. 26. Irish stat. 10 Char. I. c. 2. s. 1. s. 18.

(k) Bellingham v. Alsop, Cro.

Jac. 52. Dymoke's case, Cro. Jac.

408. Harvey v. Thomas, Cro. Eliz.

216. Isham v. Morris, Cro. Car. 109.

Bennett v. Gandy, Carib. 176. Perry

v. Bowyer, 1 Vent. 340. Bayler and

Reker's case, 2 Rep. 29. s. Hyde's

case, 4 Rep. 79.

custom of each place, which in London (being one of the places excepted (*l*)) is that lands shall pass by the mere delivery of the bargain and sale without inrolment. (*m*) In London, therefore, the bargainee may make leases immediately after the delivery of the deed.

The bargain and sale by the commissioners of bankrupt of a bankrupt's real estate, which includes his chattels real as well as his freehold estate, must be by deed indented and inrolled, but although the assignees, after an assignment of the bankrupt's personal goods and chattels, are in by relation to the act of bankruptcy : (*n*) in the case of his real property, nothing passes to them till the inrolment of the bargain and sale. Neither has the inrolment, as in the ordinary case of bargains and sales, any relation to the execution of the deed, much less to the act of bankruptcy : but the estate remains in the bankrupt, though not beneficially, until taken out of him by the conveyance. (*o*) The assignees, therefore, of a bankrupt, cannot dispose of his real property before inrolment.

By the late act (*p*) for the relief of insolvent debtors in England, the estate of an insolvent debtor taking the benefit of that act, is vested in the provisional assignee of the court erected by that statute previously to a proper assignee being appointed by the Court. No reported case has yet occurred upon the construction of this act : but since, before that statute, the insolvent's estate by the provisions of a previous statute, (*q*) was vested in the clerk of the peace, upon the order for the insolvent's discharge, the decisions on that statute may be considered in some degree analogous. It has been determined (*r*) that a conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace did not vest the estate in such creditor, either by relation to the date of the order, or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace.

After a vendor has parted with his estate, it is obvious he has

(*l*) See Green's City Priv. 91. Priv. Esdaile v. Mitchell, 2 M. and S. 446. Lond. 174.

(*m*) Darby v. Bois, 1 Brownl. 141.

(*n*) 2 Rep. 26. a.

(*o*) Perry v. Bowes, T. Jon. 196. East. 257.
Elliot v. Danby, 12 Mod. 3. Doe d.

(*p*) Stat. 1 Geo. IV. c. 119.

(*q*) Stat. 41 Geo. III. c. 70. s. 15.

(*r*) Doe d. Whatley v. Telling, 2

lost all right over it; but voluntary conveyances do not preclude the grantor from making subsequent grants for valuable consideration, and it is immaterial whether the uses of such voluntary conveyances, where they are made to uses, are vested or contingent, nor does notice to the purchaser make any difference. (s) The only valuable considerations admitted in law are either money, or something valuable in a commercial point of view, or marriage, where the conveyance is made, or agreed to be made by articles in writing, previous to marriage, and in consideration of it. All other inducements to make a grant are merely voluntary; such are settlements on wife or children after marriage, or any other consideration arising from blood, connection, or friendship. The marriage consideration runs through the whole settlement, so far as it relates to the husband and wife and issue, if the conveyance is in consideration of marriage and before it. (t) Whether a conveyance may be in part voluntary, and in part for good consideration, seems to be a point not very well settled: for instance, where a settlement is made in consideration of an intended marriage, and after the usual provisions in favour of the wife and children of the marriage other provisions are annexed in favour of collateral relations or strangers, whether these last, who are frequently called volunteers, are strictly so, as if no consideration had moved the settlor to make the deed, seems to be a question. The doctrine in the old books inclines to the making a distinction, whilst the later cases, especially in equity, seem to place such volunteers in the situation of all other volunteers. (u) A lessee at rack rent is a purchaser for valuable consideration, though no fine or foregift be paid at the time of making the lease. (x)

Although a man may not have the possession at the time of granting the lease, yet, if he has the reversion, a lease for years in writing, or freehold leases by force of the statute of uses, will be good charges upon the reversion, and will take effect in interest and possession, if the reversion is reduced into possession during the time limited for the continuance of the lease; (y)

(s) *Cross v. Faustenditch*, Cro. Jac. 3 Meriv. 249. But see *Sugd. Vend.* 180. *Doed. Otley v. Manning*, 9 East. and *Purch.* 557. 5th edit. 59.

(t) *Nairn v. Prowse*, 6 Ves. 752.

(u) See *Atherley on Marriage Settlements*, 243. *Sutton v. Chetwynd*,

(x) *Goodright d. Humphreys v. Moses*, 2 Blackst. 1019.

(y) *Mitford v. Fenwick*, And. 288. *Bould v. Wynston*, Cro. Jac. 168.

because this is the only way in which the conveyance can operate so as to give effect to the intention of the parties.

The possession of a tenant at will is no obstacle to making a lease for years, because the lease will determine the will. A present lease, however, to commence *in futuro*, does not seem to have that effect, till it takes effect in possession. (x)

It may so happen that the lessor, at the time of the contract, may have no such interest as to entitle him legally to contract for the enjoyment: a valid lease, however, may be made in some cases under such circumstances; at least, between the parties. In order to effect this, the lease must be made by indenture or fine *sur concessit*. Such leases are called leases by estoppel, because the parties to them are estopped thereby in a court of law from pleading or giving in evidence any thing contrary to the purport and effect of such their solemn act and deed. They must be made by indenture or fine *sur concessit*, because estoppels must be mutual: for the same reason no lease by the king or *femes covert*, or infants, can operate by estoppel, although made by indenture or fine *sur concessit*; for since infants and *femes covert* are not liable to estoppels by reason of their inability to contract in an effectual manner, and the king is exempted by his prerogative, the estoppel is equally inoperative as to the other contracting party. (a)

These leases, however good they may be between the parties, confer no legal title to the possession: (b) but if the lessor afterwards acquires a legal title to the premises demised, the lease will immediately commence in interest and possession; (c) and the estoppel will in that case run with the land against all those who claim under either party. (d) On the same principle, if a man takes a lease by indenture of his own land, of which he is in actual seisin and possession, he is likewise estopped from averring any thing contrary to the indenture, and for the time

(x) *Dimsdale v. Isles*, T. Raym. 324. 2 Lev. 88.

(a) *Brereton v. Evans*, Cro. Eliz. 700. *Parker v. Manning*, 7 T. R. 537. As to the king *dubio* in *Stanhope's case*, 1 Roll. Abr. 871.

(b) *Wilkins v. Wyngate*, 6 T. R. 62. *Winn v. White*, 3 Bl. 340. *Thorne v. Barton*, 1 Keb. 24.

(c) *Hermitage v. Tomkins*, 1 Ld. Raym. 729. *Ballard v. Sitwell*, Clay.

32. *Stroud v. Willis*, Cro. Eliz. 362.

(d) Co. Litt. 152. *Carvick v. Blagrave*, 1 Brod. and Bingh. 535. *Taylor v. Needham*, 2 Taunt. 278. *Blake v. Foster*, 8 T. R. 487. *Preston v. Love*, Noy. 120.

the estoppel lasts, he and those claiming under him are as perfectly lessees as if the lessor had been, at the making of the lease, the actual owner of the fee and the inheritance. (e) So if a disseisee accepts a lease by indenture from the disseisor, no remitter can operate, although the estate be for life, and livery be made; for the estoppel will prevent the livery from operating so as to work a remitter contrary to the purport of the deed. (f) On the same principle where father and son were joint-tenants for one hundred years, and the son accepted a lease for fifteen years from his father by indenture; it was held that, on his father's death within the term, he was estopped to claim the whole by survivor: but if a man seised in fee takes a lease of the herbage and pawnage of his own land, this is no estoppel to him from claiming the soil and freehold, for these may be in two different persons. (g)

Under the head of leases by estoppel leases by mortgagors may be mentioned. A mortgagee cannot make a lease to bind the mortgagor, except to avoid an apparent loss, and merely of necessity. (h) On the other hand mortgagors, and all persons having equitable interests in land and other hereditaments, have no estate which can be recognized by a court of law: neither can any lease created by the mortgagor subsequent to the mortgage, nor any lease by a *cestui que trust*, be set up in a court of law in opposition to a mortgagee or trustee. (i) In this respect mortgagors and *cestui que trusts* are in the same situation at law as mere strangers. But if a mortgagor in possession, before the day of payment, makes a lease by indenture, and then performs the condition, this will make the lease absolutely good at law, in interest, and possession: for if a subsequent purchase shall make good a lease of lands, in which the lessor had nothing at the time of the grant, much more ought the lease to be good where the performance of the condition rested solely with the lessor. So also, although default has been made in payment of the mortgage money, yet if the mortgagor be afterwards ad-

(e) Co. Litt. 47. b. 227. a. Plow. v. Dale, Cro. Eliz. 20. *contra*.

434. Rawlins's case, 4 Rep. 53. (g) Pleadall's case, 2 Leon. 159.

Sutton's case, Cro. Eliz. 140. James's (h) Hungerford v. Clay, 9 Mod. 1.

case, Moor. 181. (i) Webb v. Russell, 3 T. B. 401.

(f) Litt. a. 693. See Beauchamp Roe d. Eberall v. Lowe, 1 H. Bl. 446.

mitted to redeem, this will make an intermediate lease good which operated at first only by estoppel. (k)

Leases usually called concurrent leases may be classed under the same head. At the common law, if the possession had been once granted, a second lease purporting to grant the possession during the existence of, and for the same period of time as the first lease, was perfectly nugatory. But it seems also to be clear that if the first lessee is in possession for a term of years, a second lease in possession for a greater number of years than the first is a good lease for the surplus to commence *in futuro* after the expiration of the first by effluxion of time, and is absolutely void for all the antecedent period. (l) If, however, the first lease is for life, and a second lease be made to commence immediately for a term of years, such second lease is void, though the life on which the estate in possession depends should expire within never so short a time. (m) The case of *Bracebridge v. Clouse* (n) seems to be distinguishable: there A. having leased lands for a term of years, if the lessee should so long live, made a second lease without deed for seventy years to commence presently; and it was held to be a good lease for as many years as should remain after the first term ended, either by effluxion of time, or by the death of the lessee. The distinction between this case and that preceding is, that in the latter, although the duration of the term is liable to the contingency of the lessee's death before its termination, yet the estate continues an estate for years, and a chattel interest: but in the former case, the estate in possession being freehold, the law does not contemplate the possibility of a chattel interest exceeding it in duration. With respect to freehold leases, it is obvious that no freehold lease can properly be made during the existence of a lease in possession, unless it operates as a grant of the reversion. But leases for life, or for a term of years of a shorter or longer period than the lease in possession, may be saved by the doctrine of estoppel. If such a second lease exceed the duration of the first lease, it will operate partly by conveying an interest, and partly by estoppel. The reverse of this, it should perhaps be remarked, is not true; for where

(k) *Omelaughland v. Hood*, 1 Roll. Abr. 874.876. See also per Gawdy, J. in *Dove v. Edwards v. Omelhal-*
lum, March. 64. Willcott, Cro. Eliz. 160.

(m) See Plow. qu. 122.

(l) *Smith v. Stapleton*, Plow. 432.

(n) Plow. 420.

a lease in the first instance operates by conveying an interest, if afterwards the lessee is dispossessed by one having a better title than the lessor, no estoppel operates. (o) So also if an estoppel takes effect in interest, it will have that effect only during the occupation of the lessee; and if he be afterwards evicted, he may plead the eviction. (p) In these cases there is no impeachment of the deed itself; for it may be a good deed to all intents and purposes at the time of execution, and yet the interest granted may become void afterwards by circumstances not in the contemplation of the parties.

If the owner of the land, and a stranger, demise by indenture, this is the lease of the tenant, and the confirmation of the stranger; the word "confirmation" being here taken merely in the sense of a naked assent or acquiescence, without any reference to that species of confirmation which is technically so called: yet the lease operates also by estoppel between the lessee and the stranger, because this last having nothing to do with the land, the indenture as to him can in no other way take effect. (q)

If the indenture can operate upon the interest intended to be conveyed, there is no room for an estoppel, and its operation will be confined to the conveyance of such an interest as the lessors may legally grant. Therefore, if A. seised of ten acres, and B. seised of other ten join in a lease of the whole twenty by indenture, these are several leases according to their respective interests; and yet, since both are joined in the lease without distinguishing their separate interests, the indenture likewise operates by confirmation from each of the other's estate. (r) So if two tenants in common lease jointly by indenture, this is the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part. (s) The rule is the same with respect to coparceners; (t) for although they have but one freehold with respect to their ancestor, and being disseised could have but one assise, yet as to their disposing power they have several rights and interests. (u) Again, if tenant for life of another, and the next in remainder or reversion,

(o) *Blake v. Foster*, 8 T. R. 487. *contra*, in *Brereton v. Evans*.

Andrew v. Pearce, 1 N. R. 158. *Gil-* (r) Co. Litt. 45. a.

man v. Hoare, 1 Salk. 275.

(s) *Gyles v. Kempe*, 1 Freem. 235.

(p) *Hayne v. Malby*, 3 T. R. 441.

(t) *Milliner v. Robinson*, Moor. 682.

(q) Co. Litt. 45. a. *Brook v. Fox-* 1 Roll. Abr. 878.

croft, Clay, 137. See *Cro. Eliz.* 700. (u) *Bac. Abr. Lease O.*

join in a lease-by indenture, this during the life of *cestui que vie* is the lease of the tenant for life, and must be declared of accordingly, and the confirmation of the remainderman or reversioner: but after the death of the *cestui que vie* it becomes the lease of him in the remainder or reversion, and the confirmation of the tenant for life. (x)

If the truth appear by the recital in the indenture, there is no estoppel: (y) so also if the lessor pleads any thing which puts the title in issue, he will be considered as having waived his advantage of the estoppel, and the matter will be left at large. (z) It seems to have been formerly doubted, whether in general cases the jury are at liberty to find the fact, that the lessor had nothing in the land at the time of making the lease. Lord Coke lays it down as a rule, that the jury do well to find the truth: but then upon such finding the Court must adjudge according to the operation of law upon the estoppel wrought by the indenture, and decree the parties bound by it accordingly. But if the jury, he adds, find a general verdict for the lessee, such a jury is liable to attainder, because they take upon them the matter of law, as well as of fact. (a)

With respect to leases made by strangers to the tenant in possession, it may be observed that the act of tenant by sufferance, or any other tenant disclaiming his landlord's title, and admitting it in a third person, does not affect the landlord's title, without notice: but after notice, if he do not proceed to assert his right, the statute of limitations will run against him as in other cases. (b) So in every case, if one gains possession under the title of one landlord, no act of his or of any claiming under him will be allowed to change the nature of such possession, although he accept a new title from those claiming adversely to the original landlord, and although the right be actually in such strangers to the original lease. (c) Neither will the doctrine of estoppel be of any

(x) Co. Litt. 45. a. Newdigate's case, Dy. 234. b. King v. Palmer, Poph. 57. Treport's case, 6 Rep. 14. b.

(y) Cooks v. Bellamy, 1 Keb. 530.

(z) Trevivan v. Lawrence, 1 Salk. 276. Palmer v. Ekins, 2 Ld. Raym. 1550.

(a) Rawlins's case, 4 Rep. 53. See Reresby's case, Clay. 41. Isham v.

Morrice, Cro. Car. 110. Pledall v. Pledall, Moor. 96. Sutton's case, Cro. Eliz. 140. See also James's case, Moor. 181.

(b) 2 Scho. and Lef. 625.

(c) Saunders v. Lord Annesley, 2 Scho. and Lef. 73. Printice v. Hodgkin, 2 Bulst. 138.

service in this case; for estoppels only operate between the parties. If, therefore, a tenant at sufferance accept a lease by indenture from a stranger, the original landlord may, notwithstanding, grant over without entry. (d) If a lessee for life or years accept a freehold lease by feoffment and livery, or by fine, such an open disclaimer of their landlord's title will cause a forfeiture of their estates.

Where chattels are leased, the lessor must have a *bond fide* possession of them previous to the making of the lease: yet, where (e) a person pretending to be the purchaser of goods leased them to the former owner, who still continued in possession, although no money was proved to be given for the purchase, or rent paid for the lease, it was held to be a question for the jury, whether under the circumstances (it being the case of the Opera-house, in the Haymarket,) the lease was fraudulent; and the Court thought the possession of the lessee might be the possession of the lessor. *A fortiori*, if a judgment creditor takes in execution the goods of his debtor, and buys them by public auction, and takes a bill of sale of them for valuable consideration from the sheriff, and lets the goods to the former owner, at a rent which is actually paid, he has a title which cannot be impugned as fraudulent by other creditors having executions against the same debtor. (f)

It appears then that all natural persons who have a *prima facie* right to the possession, if not labouring under some disability such as insanity, infancy or coverture, may make a valid contract for years; and such leases, although they exceed the probable duration of the estate of the lessor, are not void *ab initio* on that account, because a lease for years is no interruption to the disposition or descent of the freehold. The feudal law recognized none but freeholders; all subordinate interests were considered therefore of small importance, and leases for years were on this account considered chattels. Their insignificance in this respect prevented their acquiring importance in others; and one main distinction, therefore, between leases for years and those which carry the freehold is, that leases for years have no tendency to disturb the right to the freehold. Leases for life or lives, being freehold interests, are of a higher nature: and their effect, when created

(d) *Preston v. Love*, Noy. 120. *Doe v. Burrell v. Perkins*, 3 M. and S. 271. *Lloyd v. Bethell*, Bridg. 56.

(e) *Reed v. Blades*, 5 Taunt. 212. (f) *Watkins v. Birch*, 4 Taunt. 823. *Kidd v. Rawlinson*, 2 Bos. & Pull. 59

at the common law by those having limited interests only, requires more consideration.

At the common law there were three kinds of estates which were liable to discontinuance properly so called; the effect of which was to turn the estate discontinued into a right, and to put the claimant when his right should accrue to his action. These were the estates of ecclesiastics seised in right of their churches, of husbands seised in right of their wives, and of tenants in tail. If any person coming under any of these denominations made any larger estate than for his own life by feoffment and livery, or by fine, or by release or confirmation with warranty, the estate of the successor, of the wife, and tenant in tail, with all remainders and reversions depending upon it, were respectively said to be discontinued, and the persons entitled were driven to the proper action provided for each of them by law in such cases. No such effect could be produced by conveyances without warranty, or to which the notoriety and solemnity of livery was wanting, or by a bargain and sale under the statute of uses, because nothing passed by such conveyances, but what the grantor might lawfully grant: for the same reason no discontinuance could be of things which lie in grant, and not in livery. Discontinuances of the wife's estate by the husband seised in her right are now taken away by the purview of the stat. 32 Hen. VIII. c. 28. which will be hereafter particularly noticed. So also the law respecting discontinuances of the estates of ecclesiastical persons is altered by the restrictive statutes passed in the reign of queen Elizabeth: but the estates of tenants in tail are still liable to be discontinued; and the issue in tail, remainderman, or reversioner, must in such cases have recourse to their respective actions of formedon for the recovery of their rights.

Estates of freehold, if made by feoffment and livery, or by fine, by tenants for life, except for the life of the grantor, create a forfeiture of their estate, because, as respects the grantor, an estate for another man's life is a greater estate than for his own life; and consequently it is a larger estate than he has a right to make. A freehold estate by tenant for years will work a forfeiture for the same reason;—and if made by tenant at will, or at sufferance, it will create a disseisin.

An estate for years has none of these consequences. It creates no discontinuance, if made for never so long a period by tenant

in tail, and no forfeiture if created by the tenant of a particular estate for life or years; (g) and even, when made by tenant at will, it will not effect a disseisin, except at election. (h) For it seems to be essential to a disseisin that there should be an entry and claim to have the freehold; or if there be no claim that the lessor should waive the occupation, or bring an action, or otherwise declare his intention to consider it a disseisin. (i) If the lessor elect to consider it a disseisin, the lessee for years is the disseisor, and the lessee at will has no longer any estate, either lawfully or by wrong. (j) On the same principle, perhaps, a lease for years by tenant by sufferance, or any stranger, is not a disseisin, except at election: such a lease, however, cannot confer any right to the possession; entry under it, if not amounting to a disseisin, will clearly be a trespass. (k)

Lunatics, infants and femes-covert are affected with the same incapacity to make leases which is attached to all their contracts.

Leases by married women are void *ab initio*, and no acceptance of rent or other mark of their acquiescence after the death of their husbands, or after their death, by their heirs, can make them good. The law has transferred the power of disposing of the property of a married woman to her husband; and he may therefore demise the whole or any part without her concurrence or consent. She is not, however, bound by the tortious acts of her husband; and therefore if the husband of a feme tenant for life or years make a lease which amounts to a forfeiture of her estate, this will not affect her surviving. (l) The lease of a feme covert may be made good against her after coverture, if made by deed, by a redelivery, or something amounting to it: for she cannot make a deed, and therefore, though she deliver the deed during coverture *nil operatur*, and the deed may be redelivered after coverture. (m) The only exception to the doctrine laid down in this paragraph, is the case of a queen consort, who is of ability to purchase lands and

(g) 1 Salk. 187. *Stornfil v. Hicks*, 4 Leon. 35.

C. temp. Holt, 414. *Roe v. Williamson*, 2 Lev. 140.

(h) *Fisher's case*, Latch. 75.

(i) *Blunden v. Baugh*, W. Jon. 315.

Hovenden v. Lord Annesley, 2 Scho. and Lef. 830.

(j) *Shaw v. Barber*, Cro. Eliz. 830.

(k) *Jerritt v. Weare*, 3 Price, Exch. Rep. 575. *Mathewson v. Trott*, 1 Leon. 209. *Goodright d. Fowler v. Forester*, 1 Taunt. 590.

(l) Bac. Abr. Lease, C.

(m) *Goodright d. Cater v. Strahan*,

Cowp. 201,

convey them, to make leases and to do other acts of ownership without the concurrence of her lord. (s)

The law, at the same time that it protects an infant from injury through his own imprudence, enables him to do binding acts for his own benefit: and where the act is equivocal, and may be for his benefit, it is, on the same principle, not void in the first instance, but voidable only by the dissent of the infant on coming to his full age. Leases therefore by infants are not necessarily void; for *prima facie*, they are for their benefit, and that without distinction, whether a rent be reserved or not: for very prejudicial leases might be made reserving a rent, and there might be most beneficial considerations for a lease, though no rent should be reserved. (o) If the lease is by deed, it has been doubted whether it is good in any respect when made by an infant. It is however clear that an infant cannot plead *non est factum*, but in order to avoid his own deed must shew infancy specially: and this circumstance, which has been urged as an argument in support of the proposition that infants can make deeds, does not admit of the answer that the meaning of the practice merely is, that the rules of pleading require that the deed should be avoided in a particular way. By custom in some places an infant seised of socage lands may make a lease for years, which shall bind him at his full age: but that is because the custom makes him of full age for that purpose. (p)

If an infant make a feoffment, and deliver livery of seisin with his own hand, it should seem that since the livery is the essential part of the conveyance, this feoffment is voidable only by the infant, and those who represent him as his executors, although there should be a deed in writing accompanying the feoffment. (q) And if an infant grant by fine, this fine must be avoided during his minority, or at least there must be an inspection during infancy, and the infancy must be recorded. (r).

All grants made by duress are voidable: but if they be by fine,

(s) 1 Bl. Com. 218. 7th ed.

P. C. 570. Madden d. Baker v. White, 2 T. R. 161.

(o) Baylis v. Dyneley, 3 M. and S. 477. Keene v. Boycot, 2 H. Bl. 515. Zouch v. Parsons, 3 Burr. 1808. Davies v. Mannington, 1 Sid. 109. See also 1 Lev. 6. and Thompson v. Leach, 3 Mod. 307. Drury v. Drury, 5 Bro.

(p) Co. Litt. 45 b.

(q) Prest. Shep. T. 204. 235.

(r) Vin. Abr. tit. Finc. k. pl. 1, 2. Co. Litt. 247. a. n. 2.

they are unavoidable, except in equity, on the ground of fraud in some particular cases. (s)

With respect to the validity of deeds or other acts of persons in an extreme state of intoxication, the opinions are various. The doctrine of the later cases, both at law and equity, seems to be to admit evidence of this nature on a plea of *non est factum*: (t) but the older writers expressly exclude persons so voluntarily depriving themselves of their memory and understanding, and their heirs, from the privilege or benefit of a man who is *non compos*. (u) But it is clear that if, through the contrivance and management of the party obtaining the deed, the grantor is drawn into drink, for the purpose of prevailing on him to execute the deed, relief may be administered in equity on the ground of fraud. (v)

It is very clear that each and every of any number of joint tenants, coparceners and tenants in common may lease his share without the concurrence of his companions: but if all the joint-tenants unite in making a lease, they all make but one lessor, and the lease is the joint demise of all. (x) Tenants in common and coparceners cannot make a joint demise: (y) but if in an action of ejectment they declare on several demises of each of the whole it is well enough, and each may recover an undivided moiety, (z) or other aliquot part or share.

A common law lease, made by a copyholder of his copyhold estate, is a cause of forfeiture, (a) except in the case of an infant, (b) (none of whose acts are allowed to operate to his prejudice) because the copyholder in the eye of the law is merely a tenant at will; and although a licence may be obtained from the lord, such a licence is merely a dispensation of the forfeiture, if the lease is made during the continuance of the estate of the lord

(s) *Prest. Shep. T.* 233.

(t) *Cook v. Clayworth*, 18 Ves. 16.
Cole v. Robins, Bull. N. P. 172. *Pitt v. Smith*, 3 Campb. 34.

(u) *Co. Litt.* 247. a. *Stroud v. Marshall*, Cro. Eliz. 398.

(v) *Jones v. Medlicott*, 3 P. Wms. 130. n. A. *Rich v. Sydenham*, 1 Ch. Ca. 202. *Cory v. Cory*, 1 Ves. 19. *Bligh's Note*, *Butler v. Mulverhill*, 1 Bligh, P. C. 141. See *Say v. Barwick*, 1 Ves. and B. 195.

(x) 2 And. 16. *Jurdain v. Steer*, Cro. Jac. 83,

(y) *Heatherley d. Worthington v. Weston*, 2 Wils. 232.

(z) *Denn d. Bryant v. Wippel*, 1 Esp. N. P. C. 360.

(a) *Ewer v. Ashton*, Moor. 272. *East v. Harding*, Moor, 392. See also *Moor*, 184.

(b) *Ashfield v. Ashfield*, W. Jon. 157.

who grants the licence, and is no direct authority to make a common law lease. A common law lease, however, by a copyholder without licence is good between the parties, and against all persons except the lord. (c)

By custom in some places copyholders may make leases for years without licence for certain terms specified by the custom; (d) such a custom for one or for three years is not uncommon. So a custom for copyholders in fee to lease for any number of years without licence, on condition that the term should cease on the death of the lessor, has been held to be a good custom. (e)

In Godb. 171. a note appears to this effect: that it was holden by three of the justices, *vis.* Walmesley, Warburton and Foster, (Coke and Daniel being absent) for law clearly: that a tenant at will cannot by any custom make a lease for life by licence of the lord, and that there cannot be any such custom for a lease for life as there is for a lease for years. This is the only authority on the point which I have met with: but from the very nature of tenures it seems incompatible with the estate of a copyholder that any custom should permit him to create a freehold interest. It seems to be equally incompatible that he should make a freehold lease, amounting to a feoffment at the common law, either with or without a licence: but there does not appear to be the same objection to his making a grant for life or lives by any of those conveyances which do not in themselves work a tort. Therefore, in another case (f) in the same book, it is said to have been adjudged that where a copyholder made a lease for three lives, and made livery, in that case because no livery appeared to be endorsed on the deed, it was held to be no forfeiture; and London's case was cited, in which it was held, that a bargain and sale indented and inrolled by a copyholder of his copyhold tenement was no forfeiture of which the lord could take advantage.

If the lord leases a copyhold estate, parcel of his manor, by way of a common law interest, it is an enfranchisement for ever: but

(c) Downingham's case, Owen, 18. Eliz. 102.

Goodwin v. Longhurst, Cro. Eliz. 535.

Spark's case, Cro. Eliz. 676. Murrell's

case, 4 Rep. 24. b. Wells v. Partridge,

Cro. Eliz. 469. Stoper v. Gibson,

Moor, 539. Gregory v. Harrison,

Moor, 679. Melwick v. Luter, Cro.

(d) Cramphorn v. Freshwater, 1

Brownl. 133.

(e) Turner v. Hodges, Hutt. 101.

(f) Godb. 269. Co. Copyhold, c. 57.

contra.

this must be understood of a lease to the copyholder, or to some person who might claim admittance by the custom ; for since, notwithstanding the demise of a tenement by copy, the freehold remains in the lord, there is no objection to the lord's demiseing the freehold of such copyhold to another than the copyholder without destroying the copyhold tenure. So the lord may make a lease of the whole manor ; and therefore where the lord of a manor leased it for years, and also his tenement called H., parcel of the same manor and copyhold, this was held to be no enfranchisement because this tenement was still parcel of the manor, and passed included in it, and the rest might be rejected as surplusage. (g)

If a baron, seised of a manor in right of his wife, leases a copyhold parcel thereof for years, by indenture, and dies, the feme surviving may, notwithstanding, demise by copy ; and the law is the same if a tenant for life demises the copyhold for years, which will not destroy the custom as to him in reversion. (h) Another exception to the general rule is in the case of the king, whose estate the law preserves from injury for his successors ; therefore, where the king granted a copyhold estate for life, it was held, that, after the estate for life it might be granted again by copy, because it might be for the benefit of the king's inheritance that it should remain copyhold. (i)

By the custom of some manors, the lord may lease for years the wastes of a manor : but such a custom to lease without restriction is bad. (k) By the stat. 13 Geo. III. c. 81. s. 15. lords of manors, with the consent of three fourths of the persons having right of common upon the wastes and commons of the manor, may lease for any term not exceeding four years, one-twelfth of such wastes for the best rent that can be got by public auction to be applied to drain, fence, or improve the residue.

It seems, says Sir W. D. Evans, notwithstanding the assertion of counsel in the *Earl of Bath v. Abney*, (l) that the owner of a copyhold estate may pass an interest for a term of years by surrender ; and the lord is bound to grant admission on such a surrender : but a fine is due on such change of tenant, and consequently the expediency of making a lease by surrender, or applying

(g) *Lee v. Boothby*, Cro. Car. 591.
W. Jon. 449.

(h) *Conesby v. Rusker*, Cro. Eliz.
459.

(i) *Cremer v. Burnett*, Styl. 266.
Field v. Boothby, 2 Sid. 137. S. C.

(k) *Badger v. Foot*, 3 B. and A. 153.
(l) 1 Burr. 206.

for a licence, in which case no fine is due, must depend on the custom of the manor, the fines in some manors being considerable, in others merely nominal. (m)

A person attainted of treason or felony may give or grant his land: but in treason the grant will be void against the king, because the inheritance is thereby forfeited. And so in felony during the party's life, the king will be entitled to hold; and after his death the lord will be entitled by escheat if there is any meene tenure: but whether this last shall have relation to the time of the crime committed, as well as forfeiture for treason, seems to admit of reasonable doubt; the title of escheat in such cases, as in all others, being for the defect of a tenant, though the failure of heirs is a consequence of the attainder and corruption of blood. (n) The grant of a person outlawed in a personal action is good against all but the king. (o)

All corporations sole, ecclesiastical as well as civil, may by the common law, without the concurrence of any other persons, make leases for life or years which will bind them as long as their interest continues. (p) And they will have the same effect even if, in their natural capacity, they labour under the disability of infancy; for if they are admitted to exercise such offices and functions within age, they are also supposed to be capable of doing all things belonging to their politic capacities as persons of full age. (q) And this applies more especially to leases by the king, which are binding immediately at whatever age they are made by him, because the law considers the king as affected with no disability by reason of his minority. (r) In the king's case his prerogative carries the exception one step farther; for if the king has lands by purchase or descent in capacity of his natural body, when he is king or before his accession to the throne, and after his accession being within age he makes a lease, it is good and binding immediately; because although in his natural body he has the imbecillity of infancy, yet this is invested with the dignity of the body politic, which is utterly void of such imperfections. (s)

(m) See Watk. Copyh. 432.

(n) See Prest. Sheph. T. 231.

(o) Ibid. 232.

(p) And. 241. 244. Sav. 119. 3 Rep. 59. Co. Litt. 45, s. *Revall v. Hart*, Gouldsb. 138.

(q) Bro. tit. Age, 24. 64. 80. *King v. White*, Ann. 8.

(r) The case of the Duchy of Lancaster, Plow. 212. but Bro. Age, 58. *contra*.

(s) Plow. 212.

For the safeguard of the subject and the preservation of the proper dignity of the crown the law has provided that no grants by the king shall be good, unless at the time of the grant his title be of record. Without a complete satisfactory title appearing on record, all letters patent (the usual mode of grant by the crown) are void *ab initio*.

With respect to demesne lands of the crown which are in the actual occupation of the crown, there can be no difficulty, since the power of the king to demise these does not differ from the power of private persons in similar circumstances. So where the king is entitled by purchase the rule is equally simple, provided the conveyance be a conveyance of record; as, for instance, a fine or deed inrolled. But there are other cases, in some of which the king becomes entitled, by what is called an inquest of office, sometimes merely an office; and in others being entitled by other means, he cannot grant without an office; and in these the rules in the books (*t*) are not so clearly ascertained and defined. In every county the king has an officer to whom is entrusted the care of the king's interest in this respect. He is usually called the escheator: but the sheriff or coroner may also be considered the king's officer for this purpose, if there be no escheator. It is their duty when circumstances require it to summon a jury, and to institute an enquiry into the nature of the king's title, or the value of the property as the case may be, and to return it into the Chancery or the Exchequer. (*u*) And after the return of the inquest, it becomes matter of record, which may be acted upon by the king's officers. These offices or inquests of office are of two kinds: 1st. An office of entitling, and, 2dly, an office of instruction. In the latter case, the king is supposed to be entitled without office by what is sometimes called matter of fact, as where the king's tenant in fee simple holding immediately of the crown dies seised without heir, or his tenant in tail dies without issue, or in any other way the estate of the king's tenant ceases or becomes void, by some matter of fact not appearing of record; the seisin and possession is in the king before office, but it is necessary that the king should be instructed of the matter of fact by

(*t*) Willion v. Berkley, Plow. 229. a. Nicholls v. Nicholls, Plow. 485, a. Page's case, 5 Rep. 52. b. Knight's case, 5 Rep. 55. a. 57. a. Downtie's case, 3 Rep. 10. b. Potter v. Stevens,

Cro. Car. 100. Finch v. Throgmorton, Cro. Eliz. 221. Parslow v. Corn, Cro. Eliz. 855.

(*u*) See stat. 1 Hen. VIII. c. 8.

which he has become entitled, and all such offices will relate to the time the king's title accrued, so as to avoid mesne incumbrances, and to entitle the king to the profits, but not to grant. (v) So also by the stat. 33 Hen. VIII. c. 20. s. 2. (x) lands of persons attainted of high treason are actually vested as to possession and seisin in the king: (y) but they cannot be put in charge by the king's officers without an office of instruction; (z) because it does not appear of record in the Exchequer of what lands the person attainted was seised at the time of his attainder or after, and the same law is of an attainder of felony of the king's tenant if he dies seised. Such offices of instruction might either be taken by virtue of office, when they were called inquests of office *virtute officii*, or by writ or commission from the Court of Exchequer, and both are equally offices of instruction. Inquests of office *virtute officii*, are by force of the st. 34 Edw. III. c. 13: and by the st. 18 Hen. VI. c. 7. and st. 1 Hen. VIII. c. 8. they must be returned into the Chancery or the Exchequer within one month after taking the same, and if returned into Chancery they are to be transcribed into the Exchequer. But by st. 33 Hen. VIII. c. 22. (a) escheators cannot sit *virtute officii* to take an inquest where the lands are of the value of 5*l.* per annum or above, on pain of 5*l.*; which statute was made to prevent escheators from seising lands by virtue of their office without a writ of seisure from the Chancery or the Exchequer. These offices of instruction settled the annual value of the lands; and by that value the escheators accounted, unless the court on putting it up to auction found any person that would give more for the land, and then they let it by lease under the Exchequer seal. (b)

The other species of office was called an office of entitling, because the king was thereby entitled. Examples of such cases are numerous: such as purchases by aliens born, by any body corporate in mortmain, or by any person attainted of felony, all of which give the crown a title but not before office. So where a condition is broken which gives a title of re-entry, in these and similar cases the king is not in possession till office found. In a late case, (c) the king's title by escheat, where the tenure was not

(v) Stamford Prerog. 54. Doe d. Hayne and the King v. Redfearn, 12 East, 96.

(x) Irish Statute, 27 Eliz. c. 1.

(y) Nichols v. Nichols, Plow. 485. a. Dy. 145. Dowtie's case, 3 Rep. 10.

(z) Page's case, 5 Rep. 52. a.

(a) *Quere* as to this statute.

(b) Gilb. Exch. 109.

(c) Doe d. Hayne and the King v. Redfearn, 12 East, 96.

immediately of the crown, but the king had become entitled by force of the statute *quia emptores*, was thought to be of the same nature, and a new title. The court however were not quite clear upon the point; and it seems more consonant with the principles of law on this head, that no distinction should prevail between escheat of such a tenancy and that of a tenancy in fee held immediately of the crown: in both an office of instruction seems necessary before the land can be granted over. If the king's tenant in fee simple be disseised and die without heir, or if an alien born or alienage in mortmain be disseised, all this must be found by office of entitling, and the king shall not be in possession till the seisin and possession of the true tenant be removed. (d) If the office of entitling relate to the fee or freehold, it must be by commission under the great seal; (e) and it seems to be likewise necessary that it should be executed in the county where the lands lie. (f) If it relate only to a chattel interest, it may be under the Exchequer seal; and the inquiry may be in any county. This perhaps is the most intelligible account of what is to be found in the books. The cases containing all the information on the subject are of an early date, and are in a few points inconsistent: but the general purport of them seems to be to the effect here stated.

An office is not of record till the return of it into the Chancery or Exchequer: it seems therefore reasonable that lands seised into the king's hands by such inquests should not be demised till after the return of the inquest. In consequence, however, of abuses of this kind having taken place, it was enacted by the stat. 8 Hen. VI. c. 16. that all such lands should remain in the king's hands till one month after the return of the inquest; and not till then be let to farm, except to those who should proffer a traverse to such inquest, to hold till the issue taken upon the same traverse should be found and discussed for the king or the party, such party finding surety to prosecute the traverse with effect, and to pay to the king the yearly value if the issue should be found against him. But, in order to understand the latter part of this enactment, it is necessary to recur to some previous statutes on the same subject. At the common law, when the king became seised of any estate of freehold or inheritance by matter of record, he who had

(d) 9 Hen. VII. 2. b. Downtid's case,
3 Rep. 10. b.

(e) Gilb. Exch. 109.

(f) Parslow v. Corn, Cro. Eliz. 855.

right could have no traverse of the inquest, but he was put to his petition of right in the nature of a real action to recover his right: in some cases, including chattels real as well as higher interests, there was another remedy called a *monstrans de droit*, and that was where office was found for the king, and by the same office the title of the party was also found. As if a disseisor aliened in mortmain, and the special matter was found by office, *scilicet*, the disseisin and alienation, the disseisee had his *monstrans de droit*: but if the office omitted the title of the party, he was put to his petition of right. (g) But a traverse was allowed only in those cases where by the inquest of office land was not in the king's hand, but the king was only entitled to a *scire facias* in the nature of that action to which a subject would have been entitled in similar circumstances; in such cases the party being in the nature of a defendant, might appear and traverse the office (h) without shewing any title in himself. The remedy by petition being found tedious in those cases to which it applied, it was enacted by the statute 34 Edward III. c. 16. that where the land should be seised into the king's hands by office of escheator, finding that the king's tenant aliened without licence, or that the king's tenant by knight service died in his demeane as of fee and his heir within age, that after the return of the office into Chancery, the party grieved might traverse the office, and the process should be tried in the King's Bench. It appears that this act only extended to cases where the king was entitled by office; besides which no office was within the purview of the act, but only an office by writ or commission; for the words of the act are, that the party shall traverse the office, "which was first taken by the king's commandment." Next, it was restrained to alienations of the king's tenants, and to wardships. (i) To remedy these and other inconveniences the stat. 36 Edw. III. c. 13. was made, the words of which are general comprehending all kinds of office, and all other cases, as well as alienation without licence and wardship. The words are: "And if there be any man that will make claim or challenge the land so seised, it is enacted that the escheator send the inquest into the Chancery, within the month

(g) Commonalty of Saddlers' case, *supra*.

4 Rep. 54.

(i) Magn. Ch. 9 Hen. III. c. 32.

(h) Commonalty of Saddlers' case, St. 1 Edw. III. st. 2. c. 12.

after the lands so seised, and that a writ be delivered to him to certify the cause of his seisin into the Chancery, and there he (the party) shall be heard without delay to traverse the office, or otherwise to shew his right, and from thence sent before the king to make a final discussion without attending other commandment, and in case that any come before the Chancellor and shew his right, by which shewing by good evidences of his antient right and good title the chancellor by his good discretion and advice of counsel, (if it seem expedient to him to have counsel) shall let and demise the lands so in debate to the tenant, yielding therefore to the king the value if it pertain to the king in the manner as he and the other chancellors before him have done in times past of their good discretion, so that he find surety that he shall do no waste or destruction till it be judged." The great objection which was made to this last statute arose from the words, "that the escheator send the inquest into the chancery, &c." which were said to imply that the act should not extend to inquests by virtue of office, because it was said that no such office could be returned into the Chancery, but only into the Exchequer: (j) but precedents without number were produced of the returns of such offices into both courts; so that the escheator seems to have had his election in this respect, and both are the king's courts for this purpose. Although the statute only speaks of offices returned into Chancery, offices returned into the Exchequer are within the equity of the statute. (k) Where the king was entitled by double matter of record, as by a judgment of attainder and office, it was held that this act did not extend to the case: but the stat. 2 Edw. VI. c. 8. s. 7. (l) has given all the benefits of this act to the party in such cases.

But to return to the stat. 8 Hen. VI. c. 16.: this statute was afterwards evasively construed, as if grants made by the chancellor, treasurer, or other officer, without finding any office, were without the statute. The statute 18 Hen. VI. c. 6. therefore provides that no letters patent shall be made to any person or persons of any lands or tenements before inquisition of the king's title in the same be found in the chancery, or in his exchequer, returned, if the king's title in the same be not found of record, nor

(j) Year book, 4 Edw. IV. 24. a.
Stamf. Prerog. 70. b.

(l) No enactment of this nature in
Ireland.

(k) Stamf. Prerog. 70.

within one month after the same return, if it be not to him or them which tender their traverses, as is aforesaid; and if any letters patent be made to the contrary, they shall be void, and holden for none. (m) Upon this statute, 18 Hen. VI. c. 6. it may be observed, that Stamford, in his *Treatise De Prerogativa Regis* 54. a., although he states that the king has a possession in law upon a descent, reverter, remainder, or escheat, yet adds, that he cannot make it his possession in deed by his grant without office, because of a statute of the 18 Henry VI. to the let thereof. So in Bro. Off. Escheator, pl. 56., it is said, if the king grant land to A. for life, and A. dies, he cannot grant the land again till A.'s death is found by office, and that by the stat. 18 Hen. VI.

Before the stat. 2 & 3 Edw. VI. c. 11. (n) a termor for years seems to have had no remedy against an inquest of office finding the king's title to the freehold. By the second section of that statute, the interests of lessees for years are saved, though not found by the office which finds the king's title in the freehold; and by section 6. if any person be found entirely lunatic, idiot, or dead, every person grieved by such office shall have his traverse as in other cases of untrue inquisitions.

It does not seem to be clear, whether the statutes which have been enumerated contemplated chattel interests. With respect to chattels personal, and things which lie in grant, as advowsons, remainders, and reversions, they are in the king without office, upon any forfeiture: but to chattels real the king can be entitled only by office, as in the case of other real property. (o) Where the crown has made a lease for years, on condition that the lease shall be void on non-payment of rent into the exchequer, there, if the condition is broken, the crown may grant over without office, because the non-payment is of record. (p) But if the rent be payable to a bailiff or deputy, or the lease is void from any other circumstance which does not appear of record, there, although the lessee after breach of the condition is *pernor de son tort* of the profits, the king is not in possession for the purpose of granting without office. (q) So if the lease be not made void by the breach

(m) March. 84. Stamf. Prerog. 61. Hardr. 101.

(n) Irish Statute, 10 W. III. c. 10.

(p) Finch v. Throckmorton, Cro.

(o) Britton v. Cole, 12 Mod. 175.

Eliz. 221.

The Attorney-General v. Fox, Hardr. 422. Attorney-General v. Freeman,

(q) Stephens v. Potter, Cro. Car.

100.

of such a condition, but is voidable only by re-entry, there also there must be an office to put the king into possession. (r) Then the question arises whether such estates are within the stat. 18 Hen. VI. In Sav. 70. it is said to have been held that they were: but that authority is not much to be relied on; for it states it to have been a question whether the freehold was in the queen before office; about which there could be no doubt, as the case arose on a term of years. In Knight's case, (s) the lease was for years voidable by entry on non-payment of rent; and it is reported by Lord Coke to have been resolved in the Exchequer chamber, that although without office the lease was not void, and although the office was not returned before the date of the patent, yet forasmuch as the office was found (that is, bore date,) before the grant, and afterwards it was returned of record, the grant was good. Anderson, (t) who reports the same case in the Exchequer chamber, takes no notice of this resolution: but in a report of the same case, (u) as argued in the Court of Common Pleas, three judges against one agree with the resolution of the Exchequer chamber as stated by Lord Coke.

It may be here observed that, on a traverse of office, if the issue is found against the king, a writ called a writ of *amoveas manum* issues on the judgment: but the king's hand is amoved immediately on the judgment before execution of this writ. (x)

In all cases at the common law, when the king's title accrued to him by a judicial record, as by attainder and office, and the king granted his estate over, there, although the party aggrieved was put to his petition of right against the king, he might have *scire facias* against the patentee: but if the king was entitled by conveyance of record only, as if a disseisor conveyed to the king by fine, deed inrolled, or other matter of record, there if the king granted over, the party might enter upon or have his action against the patentee. Also in all cases where the party grieved might have *monstrans de droit* or traverse against the king, there if the king granted over, the party aggrieved might enter, or have his action against the patentee. (y)

By the stat. 1 Hen. VIII. c. 10. persons tendering traverses and

(r) Knight's case, 5 Rep. 56.

(x) Brown v. Terry, Cro. Eliz. 523.

(s) *Ubi supra*.

(y) Comm. Saddlers' case, 4 Rep.

(t) 1 And. 173.

54. a. 59. b.

(u) Moor, 199.

desiring to have the lands to farm and finding surety, if they shew evidence to the chancellor according to the st. 8 Hen. VI. c. 16. and come into the Chancery within three months after office returned into the Chancery or the Exchequer they shall be admitted, and all other grants shall be void. (z)

The usual mode of proceeding at the present day, by those who claim against inquisitions, appears to be by petition, shewing a *prima facie* case of title to the Court of Chancery. This jurisdiction was established by the case of *ex parte Webster*: (a) but the Court has doubted whether a mere trustee should be allowed to traverse. (b) In a more recent case (c) it was contended, that the right extended only to those cases where the crown claims property by reason of the incidents of tenure. The inquisition related to certain lands, adjoining certain parishes in Lincolnshire; and the point of inquiry was, whether they were in times past covered with the sea, and were then by the sea left and not covered by the water; and whether they belonged to and had been unjustly subtracted from the crown? Upon consideration of the several statutes his honour the Vice-Chancellor observed, that they appeared to him rather to be made to regulate the exercise of an acknowledged right, than to create that right; and he concluded with saying, that his opinion was that there was a general right in the subject to traverse every inquisition by which property is to found in the crown.

Corporate bodies, consisting of several persons, if they have a superior or head, such as a mayor in a corporate town, or a dean in the chapter of a cathedral, may make leases for lives or years, which shall be binding on them as long as the same individual exercises the office of their head or superior: (d) but if the corporation aggregate have no superior, no such rule can be adopted; and consequently their leases, if made at the common law, are void *ab initio* even against themselves. (e)

The constitution of dean and chapter at the present day differs

(z) No Irish statute to this effect.

(a) 6 Ves. 809. *Ex parte Wragg*,
5 Ves. 450, 832.

(b) In re Sadler, 1 Madd. 581.

(c) *Ex parte Lord Gwydir*, 4 Madd.
281.

(d) *Walter v. The D. and Ch. of*

Norwich, Moor. 875. *Magdalen Col-
lege case*, 11 Rep. 78. a. Co. Litt.
48. a.

(e) *The Chapter of Southwell v. The Bishop of Lincoln*, 1 Mod. 204,
2 Mod. 56.

materially from the ancient corporation of abbot and convent. The convent were all dead men in law ; and considered incapable of granting, except by their superior : therefore, if an abbot and convent were parsons imparsoned of a church, the abbot was said to grant with the consent of the rest. But a dean and chapter at the present day may make leases in their joint names of the possessions which they hold as a corporation aggregate. So in a corporation of master and fellows the master is but a part of the acting part, and is one of the grantors like the rest. (f)

Executors and administrators may, by virtue of their office, dispose of terms for years, which are vested in them in right of their testators and intestates ; and it seems to be clear that executors may demise before probate. (g) But if executors refuse to administer, they cannot dispose of the term after administration granted by the ordinary to another. (h) Where there are several executors, each has the entire interest ; and a grant consequently by one is as effectual as if all had joined ; and even where the deed purports to be a grant by all, yet if one only seals the deed, it has been held to be binding on all. (i) As to administrators, it has frequently been said, they have but a joint authority : but the contrary has been solemnly held in the case of *Willand v. Fenn*. (j)

If the person, who by consanguinity ought to be the administrator of an intestate, is an infant, a qualified power of administration during the infancy of such person is given to his guardian, or to such person as the Spiritual Court thinks fit to act for the infant till the age of twenty-one. (k) The rule was somewhat different in the case of infant executors, till the stat. 38 Geo. III. c. 87. s. 6 and 7. That statute directs that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have arrived at the age of twenty-one years ; at which period, and not before, probate shall be granted to him ; and the person to whom such administration shall be granted shall have the same powers vested in him as

(f) Dy. 40. *Ireland v. Barker*, Ch. Ca. 616.

Godb. 210. *Anon.* 12 Mod. 232.

(j) Cited 2 Vez. 267, 268.

(g) *Roe d. Bendall v. Summersett*, 3 Bl. 692.

(k) *Freke v. Thomas*, Salk. 39. *Edmund v. Shaler*, Com. Rep. 159. *Atkinson v. Cornish*, Carth. 446.

(h) *Broker v. Charter*, Cro. Eliz. 92.

(i) *Simpson v. Gutteridge*, 1 Madd.

an administrator now hath by virtue of an administration granted to him *durante minoritate* of the next of kin.

The husband of a feme executrix has a joint interest with her in all the effects of the deceased, and is enabled by law to assume the whole administration, and to act in it to all purposes without her consent; nor can the wife do any valid act as executrix without the husband's concurrence. (*k*)

Guardians in socage, under which head may be included as well guardians by the election of the infants themselves, after they arrive at the age of fourteen, as testamentary guardians or guardians appointed by deed under the stat. 12 Car. II. c. 24. (*l*) have the power of making leases for years during the continuance of their guardianship. All these different kinds of guardians differ only in their mode of appointment. (*m*) The guardian in socage is appointed, not by any special designation of the party, but by the law itself in respect of the land descended; so that where no land descends, or it is merely an equitable estate, there can be no guardian in socage; (*n*) and though the heir, after he arrive at the age of fourteen, may choose his own guardian, who shall continue so till he is twenty-one,—this last, as well as the guardian in socage, derives his authority, not from the infant, but from the law. Neither would it answer the intention of the law if it were otherwise, because the contracts of the guardian would in that case partake of the imbecillity the law attributes to the acts of the infant. (*o*) The stat. 12 Ch. II. professes to follow the model of guardianship in socage, and privileges parents against common right only in the mode of the appointment. All these guardians have an interest as well as an authority, till their guardianship ceases. (*p*) The interest is a chattel interest; and if a feme guardian takes baron the guardianship is transferred, like any other chattel, to the husband, who may make leases dur-

(*k*) Com. Dig. Administration D. Ankerstein v. Clark, 4 T. R. 617. Off. Ex. 207. Thrustout v. Coppin, 3 Wils. 277.

(*l*) Irish stat. 14 and 15 Car. II. c. 19. See also statutes 21 and 22 Geo. III. c. 62., 30 Geo. III. c. 29., and 32 Geo. III. c. 21. Gabb. Dig. Vol. I. 420.

(*m*) Beqell v. Constable, Vaugh. 177. Lord Shaftesbury's case, 2 P. Wins. 102.

Roe d. Parry v. Hodgson, 2 Wils. 129. Co. Litt. 88. b. n. 13.

(*n*) R. v. Toddington, 1 B. and A. 560.

(*o*) Guardianship by the father continues till his son is twenty-one, in respect of his body, not of his lands. See the King v. Thorp, Carth. 384.

(*p*) Dugar v. Norton, 1 Freem. 102. Wade v. Baker, 1 Lord Raym. 130.

ing the coverture without her concurrence. A guardian by nurture cannot make a lease for years, either in his own name or in the name of the infant; for he has nothing in the land by virtue of his office; and such a guardian may be, although the infant should have no land. (q)

Before the stat. 12 Ch. II. a tenant in socage might have devised his land in trust for his heir: but such a devise would not have attracted to it the custody of the person. The trustee would in that case have taken a chattel interest for the benefit of the heir, and might make leases for years. So it has been determined (r) that if a devise be made till the son come to a certain age for special reasons, such as payment of debts, or for the support and provision of the devisee, or for the maintenance of the testator's children generally; in such cases the executor or devisee shall have a chattel interest vested in them for those purposes till the son shall have arrived at the age specified, if he so long live, without being subject to the contingency of his dying within age: to the extent therefore of such interest such devisees may dispose of the land.

The committee of a lunatic's estate, or the receiver of an infant ward in Chancery cannot of his own authority make leases; the course of the Court is to refer it to the master to consider and report whether the lease will be for the benefit of the infant; and if it is so, the Court will order it: (s) It was formerly doubted whether, in the case of a lunatic's estate, even such a lease, so made by order of the Court, was good at law; because the king himself could not make a lease of a lunatic's estate: but that doubt has been removed by the stat. 43 Geo. III. c. 75. which enables the Courts of Chancery in England and Ireland to lease the estates of lunatics.

Trustees of charity estates, and those who have the legal estate vested in them under private conveyances, have a power fully recognized in law to make a complete alienation of such estates, without the concurrence of the *cestui que trust*; and even where the founder of a charity has given express directions as to the mode

(q) *Willis v. Whitewood*, Owen 45, *Shepland v. Radlen*, Owen 115.

(r) *Boraston's case*, 3 Rep. 19. *Smith v. Havens*, Cro. Eliz. 252. *Parker v. Plummer*, Cro. Eliz. 190. *Bul-*

der v. Blackburn, Hob. 285. *Taylor v. Bydall*, 1 Freem. 243.

(s) *Foster v. Merchant*, 1 Vern. 262. *Knipe v. Palmer*, 2 Wils. 130.

in which the trust is to be executed, their alienations, though not pursuant to the directions of the founder, are good in law; but the Court of Chancery will not permit the legal powers of trustees to be exerted to the prejudice of the charity, or against the will of the *cestui que trust*. (t)

A bailiff of a manor cannot make a lease, because he has no estate either legal or equitable in the manor itself; (u) and indeed, according to the opinion of the Court in the case of *Drury v. Fitch*, (x) the committee of a lunatic's estate is merely a bailiff, and has no interest. So a receiver, or other person appointed by the Court of Chancery, is no more than a bailiff, and therefore he cannot make leases of his own authority. (y) A special authority will enable bailiffs to make leases: but so it will any stranger whom the person delegating chooses to appoint. Such special authorities are ministerial in their nature, and the leases made in pursuance of them are the same as if they had been made by the legal owner of the estate. It does not appear to be necessary that such an authority should be special to make a specific lease: but a lease made by an agent acting under a power of attorney, as agent and manager of property, has been considered as effectually binding the principal. (z) So in one case, (a) although no special authority could be produced after an acquiescence of thirty years, an authority was presumed, and the principal was held bound by the act of his agent. In pleading, if one declare on a lease made by A. on the behalf of another, it will be intended that he had an authority from the owner of the land. (b)

By the stat. 7 Ann. c. 19. minors, being trustees, are empowered by the direction of the Court of Chancery or Exchequer, on the petition of *cestui que trust*, to make renewals of leases; and they are compellable to make such conveyances as the Court may direct, as if they were of full age. The stat. 4 Geo. III. c. 16. contains the same provision with respect to the counties palatine of Chester and Durham, the dutchy of Lancaster, and Wales. The 2 Geo. I. c. 6. Ir. is the Irish Statute to the same effect. The 4 Geo. II. c. 10. Eng. and 5 Geo. II. c. 8. Irish, give the

(t) 13 Ves. 580.

(u) Bro. tit. Bailly 40, 41. Lease 37.

(x) Hutt. 16.

(y) Wynne v. Lord Newborough,
1 Ves. J. 164.

(z) *Hamilton v. The Earl of Clan-*
rickard, 1 Bro. P. C. 341. Toml. Ed.

(a) *Tufton v. Wentworth*, 1 Bro.
P. C. 165. Ed. Toml.

(b) *Rashleigh v. Williams*, 2 Ventr. 61.

same powers to the Chancellors of England and Ireland, in respect of idiots, lunatics, and their committees.

By the stat. 11 Geo. III. c. 20. s. 1, 2. lunatics and their guardians and committees are enabled to accept surrenders of old leases, and to grant new ones. By s. 3. all fines for such renewals are to be paid to the committee: but, upon the death of such lunatic, the sums which are unapplied for his benefit are to be considered real estate, unless such lunatic were tenant for life only, when they are to be considered personal estate. The Ir. st. 11 Ann. c. 3. provides, that if any person who is an infant, covert or lunatic, shall be obliged by any covenant to renew, a renewal may be made under the direction of the Court of Chancery in the manner mentioned by the Act.

2. We come now to the consideration of the title of the lessor. Those who have a right to contract for the possession may, under the restrictions above mentioned, bind their own interests and the interests of those claiming under them for a definite time: but at the common law they could not bind the interest of third persons. Now by means of powers in private conveyances, operating by force of the statute of uses, tenants for life frequently are enabled to make leases for lives or years for longer periods than they could without such powers. So also the stat. 32 Hen. VIII. c. 28. has enabled husbands seised in right of their wives, ecclesiastical persons in certain cases, and tenants in tail, to do the same under certain conditions: the consideration of all which interests will be the subject of future consideration in the present Chapter. But to return to the consideration of the title of the lessor generally.

It may be laid down as a rule, that wherever the estate which the lessor had in him at the time of making the lease is defeated or determined, the lease is extinguished with it. If therefore an estate in fee simple is liable to be defeated by force of a proviso or a contingent event by way of shifting or contingent use or an executory devise, the lease is liable to the same contingency, and will be utterly gone after the happening of such an event, with the estate out of which it is derived. (c) A lease, however, in possession or reversion made by a covenantor in the case of a covenant,

(c) *Harvey's case*, 4 Leon. 161.

to stand seised to uses will bind a contingent use; and this seems analogous to the power which it is admitted the covenantor possesses to bar a contingent use by feoffment on good consideration without notice: but it is conceived that such a lease must be made on good consideration, for it was said to resemble the case of a lease made by feoffees to uses at the common law, which might bind a future use if made on good consideration. (c) So if a power of revocation be annexed to the estate of the lessor, it cannot be exercised after the grant of a lease for valuable consideration, to the prejudice of the lessee. (d)

A lease for life or years made by a disseisor or other wrongdoer is absolutely determined by the entry of the disseisee or the rightful owner: but if the disseisee confirm the lease when out of possession, he cannot after entry avoid it, because he has by his confirmation parted with so much of his ancient right as to deprive himself of the power of avoiding it. (e) If the disseisee release to the disseisor, although the release changes the quality of the estate, so as to make that rightful which before was tortious, yet leases and other charges made by him cannot afterwards be avoided, because no man can have advantage of his own wrong. (f)

In former times leases for years were considered only as contracts between the parties, without reference to any direct property in the land. The tenant for years was therefore for a long time in the power of the freeholder, and was frequently defrauded of the possession by the advantages which the forms of real actions gave to the freeholder over him. The method usually taken to deprive the tenant for years of his contract was by feigned or collusive recoveries between lessors and strangers: the estate of the lessee being considered too weak in its nature, he could not be admitted to defend the title to the freehold, and therefore his term was necessarily destroyed by the loss of the estate out of which it was derived. In such cases the lessee appears to have had no remedy but an action of covenant against the lessor, by which damages might be recovered for the loss of the term. The

(c) Wood v. Reigold, Cro. Eliz. 765, 854. Heyns v. Villars, 2 Sid. 64, 98, 157.

(d) See Sugd. Pow. 51. 3d edit.

(e) Mayow's case, 1 Rep. 147. a. In

Litt. s. 527. there is a quere of this point: but in Poph. 50. where Mayow's case is also reported, it is said to have been granted by the whole court.

(f) Litt. s. 477. Co. Litt. 274.

stat. 6 Edw. I. c. 11. commonly called the statute of Gloucester, (g) gave the tenant some remedy for the recovery of the possession by way of receipt, and a trial whether the demandant in a recovery moved his plea by right or by collusion. If it was by collusion, the termor was entitled to enjoy the possession during his term; and the execution of the judgment was postponed till the termination of the lease. This statute seems however to have been an insufficient protection: several inconveniences are stated to have attended the mode of obtaining relief under it; in consequence of which the remedy fell into disuse, and feigned recoveries became as great instruments of oppression as before. (h) The stat. 21 Hen. VIII. c. 15. (i) at length freed the termor from these difficulties, and enabled him to falsify all recoveries against the tenant of the freehold on feigned and untrue titles, (k) in the same form and manner as the freeholder might have done without any of the restrictions which arose upon the construction of the statute of Gloucester. (l)

If a testator, after having devised the fee, make a lease for years to another, even to commence after his death, this is a revocation *pro tanto*, for the will is ambulatory till his death: (m) but a subsequent act to effect a revocation must amount to a necessary implication, and be wholly inconsistent with the devise; therefore where, after the devise of a manor, the lessor leased a parcel of it to another to commence after his death, this was no revocation, for such parcels are severable from a manor, and are frequently severed. (n)

If tenant in fee simple make a lease for years, and die without heir, the lord by escheat, it is said, cannot avoid the term, which seems to be a relaxation of the feudal tenure. In the same way a subinfeudation is not affected by the escheat of the mesne tenancy. (o) The only remark which it is necessary to make on the descent of an estate in fee simple, charged with leases for lives or years, is common to

(g) See 2 Inst. 322.

Flower v. Rigden, Cro. Eliz. 234.

(h) Co. Litt. 46. a. Fig. Recov. 31.

F. N. B. 458.

F. N. B. 340.

(m) Montague v. Jefferies, 1 Roll.

(i) Irish Statute, 33 Hen. VIII. sess. 1.

Abr. 616. Wilcox's case, 1 Roll.

c. 11. s. 2.

Abr. 46. Hodgkinson v. Wood, Cro.

(k) As to the mode of falsifying recoveries, see Fig. Recov. 165.

Car. 23.

(l) Cooper v. Denne, 1 Ves. J. 567.

(n) Lamb v. Parker, 2 Vern. 495.

Coke v. Bullock, Cro. Jac. 49.

Wind v. Jekyll, 1 P. Wms. 575. Willoughby v. Willoughby, 1 T. R. 763.

(o) Whittingham's case, 8 Rep. 44.

b.

all estates upon which dower can attach. If the lease is made during coverture, it is void against the dowress surviving, but it will be revived against the heir. (p) If it has been made before coverture, the widow can be endowed only of the rent and the reversion. And in effect a long term of years, reserving no rent created prior to marriage, is a bar of dower. (q)

But if a copyholder makes a lease for years of copyhold land, of which his feme surviving is entitled by custom to her widow's estate, she cannot avoid it after her husband's death without a special custom enabling her to do so. (r)

The issue of tenant in tail, if they take by force of the gift in tail, may avoid leases made by the last tenant in tail: but they are not absolutely void on the transmission of the estate tail from one tenant in tail to another. The whole inheritance is in the tenant in tail for the time being; and therefore there is a possibility of his charges remaining good as long as the estate tail continues. If, however, such tenant in tail after having made a lease for years, or an estate for life, by any of those means which do not create a discontinuance, dies without issue capable of taking the estate tail, these leases will be absolutely void against the remainderman or reversioner, because they are distinct estates, and the remainderman and reversioner claim nothing by the entail. (s)

By the stat. 11 Hen. VII. c. 20. if a woman having an estate tail jointly with her husband, or only to herself, or to her use in any lands or hereditaments of the inheritance, or purchase of her husband, (t) or given to the husband and the wife in tail by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, being sole, or with any after taken husband discontinue or alien, release or confirm with warranty the same, every such discontinuance is void; and the person to whom the title or inheritance after the death of such woman appertains may enter, as if no such discontinuance, &c. had been made. The statute further ordains, that if any of the said second husbands and their wives, or any other seised to their

(p) Co. Litt. 46. a.

(q) Co. Litt. 208. a. n. 1. Hay and Butt, Sugd. Vend. and Purch. 353. 4th edit. Bates v. Bates, 1 Lutw. 719. Foljambe's case, Godb. 163.

(r) Farley's case, Cro. Jac. 36. Dugworth v. Radford, W. Jon. 462. 1

Freem. 16. Salisbury d. Cooke v. Hurd, Cowp. 481.

(s) Woodroff v. Greenwood, Noy. 56. Bro. tit. Accept. 19.

(t) Kynaston v. Lloyd, Cro. Jac. 624. Eyston v. Stud, Plow. 463.

use, shall discontinue or alien as aforesaid, the person or persons to whom the said lands should or ought to belong after the decease of the said women may enter into and enjoy the same, as if the same women were dead, as against the husbands during their lives, provided that the said women after the coverture may re-enter and enjoy the same of their first estate : but if such women were sole at the time of such discontinuance or alienation, then she shall be barred and excluded from her title to the same from thenceforth. This statute it may be observed, although still in force, is seldom called into action, since settlements are now seldom, if ever made, on the wife within the scope of the statute.

The intention of the statute was to protect the inheritance of the husband from alienations of estates tail given to the wife by way of jointure : therefore if it appear that such an estate was not intended to be by way of jointure, although it may come within the words of the statute, yet the wife will not be within the penalty ; as for instance, where a man devised an estate in fee to his wife in tail general, remainder in fee to a stranger ; it was held, that since there was no reversion reserved to the heirs of the husband, the case was not within the statute, because the intention of the statute was to protect the inheritance of the husband, and here the heirs of the husband could not be prejudiced since the remainder-man was a stranger. (u)

If the heir of the husband after such a discontinuance convey the reversion by fine to a stranger, the conusee of the fine may enter by force of the statute ; and it makes no difference whether the fine be with or without proclamations, for the fine operates by conclusion on the issue in tail who levies it, and the immediate title is in the conusee. (x)

A discontinuance is a displacing of the reversion as well as a discontinuance of the estate tail ; neither can this consequence be avoided by the reversioneer joining in the lease ; for it is a tortious act, notwithstanding, and his estate being turned to a right, the lease which works the discontinuance cannot take effect out of the reversion, even if tenant in tail die without issue capable of taking the estate tail. (y)

(u) *Foster v. Pitfall*, Cro. Eliz. 2.
See more on this statute, 1 Evans's
Statutes, 214. Gilb. Uses and Trusts,
359. with Mr. Sugden's Notes.

(x) Sir George Browne's case, 3
Rep. 50. b. See *Barker v. Taylor*,
2 Leon. 168.

(y) *Baker v. Hacking*, Cro. Car. 387.

The issue in tail in all cases of discontinuances, except those made by tenant in tail *ex provisione viri*, is driven to his action of *formedon in descender*; because such a transfer of the freehold cannot be impeached during the life of the donee in tail; and the statute *de donis* has not absolutely nullified his alienations, but only enables the issue in tail to defeat them after his death by action. The remainder-man and reversioner have each of them likewise their action of *formedon* in remainder or reverter, when their title accrues, by reason of their privity of estate. (s)

If a feme sole tenant in tail makes a lease for years at the common law, and then takes dower, and they have issue, and then the wife dies, the issue cannot avoid the lease during the life of the husband, because his estate by curtesy is a continuation of his wife's estate: and though the husband should surrender his estate to his issue, yet during the life of the husband the estate by curtesy has continuance as to the lessee: for the voluntary act of the tenant by the curtesy will not be allowed to operate to the prejudice of the lessee. (a) So where an estate was made to the husband and wife and the heir of the body of the husband, and the husband after making a lease for years died: acceptance of rent by the issue was held not to be a good confirmation during the life of the wife, who was entitled to the whole by survivorship. (b) It seems to follow upon the same principle, that if the issue in tail enter on the land, and assign it in dower to the widow, the lease cannot be avoided by the issue during the life of the dowress, because she is in by her husband, and the entry of the issue must be intended to have been merely for the purpose of assigning dower. (c)

It seems to be clear, that a tenant in tail cannot make a lease for years to commence after his death: (d) but if he makes a lease to commence *in futuro*, and dies before its commencement, the law considers it, according to Lord Holt, as merely void against the issue; but the issue may conclude himself to deny it by acceptance of rent, or other act of acquiescence after its commencement. (e) This power is extremely different from the

(2) Co. Litt. 327. a.

(c) Bac. Abr. Lease, D.

(a) Dy. 46. b. *in marg.* *ibid.* 387. *in marg.* Co. Litt. 338. Powtreff's case,

(d) Symonds v. Cudmore, Carth. 238.

Owen 83. Moor 8. pl. 30.

(e) Symonds v. Cudmore, *supra*.

(f) 3 Rep. 64. b. 3 Salk. 3.

power of election as to leases in possession, because no act of the issue, such as entry, is necessary to avoid the lease. The other three judges were of a different opinion: but Lord Holt's opinion seems to be confirmed by other books. (f)

If an estate tail be given to a man and the heirs of his body, and the reversion descends upon him, a lease subsequently made by him will affect both the estate tail and the reversion; and therefore if he die without issue capable of taking the estate tail, the lease will still be a good charge on the reversion: so if he levy a fine, the charge will be unavoidable. (g) But if he acquires the reversion after making the lease, the lease will have no tendency to be a charge on the reversion.

Where the reversion is in the crown, and the estate tail is of the gift of the crown, if, after making a lease for years, the tenant in tail is attainted of high treason, the lease is thereby extinguished; because the crown as donor is in by title paramount the estate tail. For all donations create a tenure to which fealty and other duties are annexed as conditions of tenure; treason being a breach of these conditions, the king is entitled in this case to the estate for the condition broken, and this determines the estate tail and all charges with it. But where the estate tail is not of the gift of the crown, there, although the reversion be in the crown, leases made by tenant in tail before attainder are not extinguished by the forfeiture, because the crown is not in possession in point of reverter, but has a base fee subject to all lease and charges as the tenant in tail himself would have been. (h)

If a tenant in tail makes a lease for life, by which he gains a new reversion in fee during the life of the tenant for life, and afterwards makes an estate for life or years, and then the tenant for life in possession dies in the life of the grantor, the second lease shall be good, although the grantor is now reinstated in his ancient estate, because the grantor at the time of making the lease had the ancient right in him; and since all charges would have bound both the defeasible estate and the ancient right, if

(f) Co. Litt. 46. b. Dy. 279. a. P. C. 356.

Plow. 436. b. 1 Roll. Abr. 842. Symonds v. Cudmore, Carth. 258. See Skinn. 330. Dy. 297. Cro. Car. 457. 7 Mod. 27.

(g) Shelburne v. Biddulph, 6 Bro.

(h) Anon. Dy. 107. b. The Attorney-General v. Austen, Dy. 115. a. cited Plow. 560. The Queen v. Hussey, Cro. Eliz. 519. Godb. 394. 2 Roll.

4 Rep. 91. Yelv. 150.

they had been in different persons, and both had concurred in making them, so where they are both in the same person, if the one fails, the other will support it. (h)

Where tenant in tail made a feoffment to the use of himself in fee, and then made a lease for years and died, it was held to be absolutely void upon his death, because the lease was derived out of his tortious estate in fee simple, and then that estate was absolutely void by the remitter of the estate tail to his issue: (i) but if a man is in by a wrong title, and is afterwards remitted to his right estate, although his tortious estate is afterwards defeated by remitter, yet he cannot avoid a lease made by himself previous to it. The case stated (k) as an illustration of this doctrine is as follows: tenant in tail enfeoffed his eldest son within age at the common law, who after his full age made a lease for years, and then was remitted by his father's death to his estate tail, the lease was held to be good, although the discontinuance was purged. This case, however, can be rarely expected to happen in modern times; (l) besides which the statute of uses has made a great alteration in the doctrine of remitter; for if a tenant in tail since that statute had made such a feoffment to the use of his issue in tail, the issue would not have been remitted on the death of his ancestor; because the statute executes the possession in the form in which the use is limited, and the possession so executed cannot be divested by an operation only applicable to common law conveyances. The remitter will, however, operate upon the estate of the issue in tail of the next generation, and the lease will be void on that event if it continue so long. (m) The lease here meant must be understood to be a lease in possession, for an *interesse termini* is no obstacle to a remitter; but, like all other collateral charges not affecting the possession, will fall off with the estate on which it is dependent. (n)

Where tenant in tail, with remainder to himself in fee, levied a fine with proclamations of lands in ancient demesne, which was afterwards reversed by writ of deceit, the court held clearly that the issue in tail being remitted, might avoid all estates made by

(h) Arden's case, cited 7 Rep. 14. a. 315.
Moor. 325.

(i) See Harg. note on guardianship in chivalry. Co. Litt. 88. b. n. 11.

(k) Moor. 846. pl. 1143.

(l) Per Bromley, J. Dy. 51. b. Moor.

(m) Co. Litt. 348. b. Duncombe v. Wingfield, Hob. 254. Bridgeman v. Charlton, 1 Roll. Rep. 260.

(n) Per Bromley, J. Dy. 51. b. Moor.

315.

the ancestor tenant in tail: but the ancestor having made a lease for years with remainder for life after the fine levied, and before it was reversed, the court held that the issue in tail could not enter to avoid those estates without bringing *scire facias* against the tenant of the freehold (the terretenant in all real actions). (o)

All charges made by a joint tenant which make no alteration in the possession or the freehold are void against the survivor, because upon the death of his companion he is in by a title paramount: but with respect to one moiety or other joint share of the estate, the law allows to each joint tenant such an interest in the life or lives of his companion, that a lease for years either to begin presently or after his death will bind the survivor. A lease for life, if the estate in jointure be freehold or in fee simple, will dissolve the joint tenancy, at least during the continuance of the estate granted. It will follow that if the estate in joint tenancy be for the joint lives of any number of joint tenants, no greater estate can be made by each than for the life of the grantor; for after the severance of the jointure the estate of each will depend on his own life, and therefore a lease for the life of another will be a larger estate than he is entitled to grant. If the estate in jointure be merely an estate for years, any lease for years, whether for a greater or less term than the original estate, will cause a severance. (p)

A lease for years, to begin after the death of the lessor, is to be distinguished from a devise, because the first is a present disposition of the land, although to commence in interest at a future time: but a will is ambulatory till the death of the testator, and therefore a devise comes too late to prevent survivorship, which is an elder title. (q) By the custom, however, of London, a joint tenant may devise his moiety without any other severance of the jointure; (r) and therefore may make a lease by will.

Although the law allows to each joint tenant such an interest as has been described in the life or lives of his companions with

(o) *Cary v. Dauncey*, Cro. Eliz. 471.
See *Kempe v. Lawrence*, 2 Brownl.
144. Ow. 134. Cruise's Dig. vol. 5.
p. 231, *et seq.*

(p) Co. Lit. ad loc.

(q) *Harbin v. Barton*, Moor. 395.

(r) *Priv. Lond.* 1702. 145. The same custom is mentioned somewhere in Hobart's reports.

respect to his own share, he has no power to lease or contract for the share or shares of the others, for his interest by survivor is a bare possibility which cannot be the subject of contract. (t)

Marriage is no severance of jointure; and therefore if a feme sole joint tenant with a stranger marries, and the wife and her husband make a lease for years, this will be binding on the stranger surviving. (x)

Coparceners and tenants in common, as far as their leasing power is concerned, do not differ from others having independent estates. Their estates are, however, so far like those of joint tenants, that till partition no particular part can be said specifically to belong to one more than another. If, therefore, a joint tenant, coparcener or tenant in common, demise his or her share for life or years, the lessee becomes tenant in common with the other joint tenants, parceners, or tenants in common. If partition is made, the partition will relate back to the time of the title accruing; therefore if one joint tenant, coparcener, or tenant in common, has leased one acre in particular for 20 years, and then partition is made by which the acre in question is allotted to the other joint tenant, coparcener, or tenant in common, the lessee may be ousted without any remedy, for the partition relates back to the time when the title accrued. (y) In the place cited below it is stated of parceners only: but it seems to be equally true in the two other cases. (z)

If a tenant for his own life, or *pur autre vie*, make leases by feoffment or fine for the life of the grantee, or any other person than the grantor, or *cestui que vie*, it will be a tortious estate as has been already observed, and cause a forfeiture of the estate of the grantor; and further, where a tenant for life and the next in remainder for life joined in such a lease to two for their lives, it was held that the reversioner might enter, because the remainderman for life was *particeps criminis*. (a) If, therefore, the reversioner neglect to enter, a lease so made will continue good as long as if it had been derived out of an estate in fee simple; for the grantor

(t) Whitlock v. Horton, Cro. Jac. 91. Moor. 776. 2 Roll. Abr. 89. Noy. 14. Godb. 146.

(x) Smallman v. Agburrow, 1 Roll. Rep. 401. Cro. Jac. 417.

(y) Plow. Qu. 226.

(z) Stat. 31 Hen. VIII. c. 1. Stat. 32 Hen. VIII. c. 32. and Baring v. Nash, 1 Ves. and B. 555.

(a) Martin v. Savery, 1 And. 45.

has thereby gained a tortious reversion in fee simple. But leases for years or such grants for life as do not work a forfeiture fall off absolutely with the estate of the lessor; and as they require no entry to avoid them, so no act of the remainder-man or reversioner can affirm them after the expiration of the estate for life on which they depended. The remainder-man or reversioner, however, may affirm such leases during the life of the tenant for life or *cestui que vie*; and this will be a confirmation absolutely whether the life on which the estate of the grantor depends continue so long or not. (b) If the tenant for life purchase the reversion after making any such lease, this will not give them any continuance beyond the life upon which the estate of the grantor depended at the time of making the lease. (c) But in this case the law will preserve the estate for life from being drowned, or merged in the reversion so far as to protect the inferior interests derived out of it, and the merger will only operate on the immediate reversion. (d)

Where estates were settled on A. for life, remainder to an infant, it was moved in the Court of Chancery on the behalf of a receiver appointed under a creditor's bill for a reference to the master, to see whether it would be for the benefit of the parties that he should be enabled to make leases. The Vice-Chancellor observed that the object of this motion was to enable the receiver to make leases to bind the infant remainder-man;—he recollected no instance in which the Court had assumed such a jurisdiction, and refused the motion. (e)

In the case of derivative leases by tenants for years, which are usually called underleases, they are necessarily extinguished whenever the original lease terminates by effluxion of time, or by any other event provided for by the original contract. Thus, if the lease be forfeited by a breach of a condition, this is as much a natural termination as the effluxion of the term by lapse of time: but no voluntary act of the lessee, such as surrender or purchasing the reversion, will produce this effect. The same may be said of a descent of the reversion: but the merger will operate

(b) Doe d. Simpson v. Butcher, Dougl. 52. Jenkins d. Yate v. Church, Cowp. 482. Doe d. Potter v. Archer, 1 B. and P. 531. Ludford v. Barber, 1 T. R. 86.

(c) Moor. 20. pl. 69. Plow. Qu. 124.

(d) Rothwell's case, Hetl. 91. Sheph. Touchst. 301.

(e) 3 Madd. Ch. Ca. 469.

only on the immediate reversion. (*f*) It is obvious that these remarks apply equally to cases where the lessor is tenant for life, whose estate is capable of all the incidents just mentioned,—such as surrender, forfeiture, (*g*) and merger. Where (*h*) a lessee made an underlease, and then incurred a forfeiture, and then took a new lease, the undertenant was decreed in equity to take a new underlease: but it is a more natural and usual exercise of equity to compel the lessor to grant a new under-lease.

In conclusion of this part of the subject, it may be remarked, that a judgment binds from the time of signing it: if, therefore, a lease be made afterwards, and then an elegit and inquisition issues, founded upon such a judgment, the freehold may be extended, and the lease will be avoided in toto. (*i*)

The case of husbands leasing the estates of their wives seems to be an exception from every rule: leases for years, by parol of the wife's freehold estate, made by the husband, are good only during the life of the husband; and after his death are void *ab initio* against the wife and those claiming under her. (*j*) To make leases of the wife's estate capable of enduring beyond the coverture, they must be by deed: but whether the concurrence of the wife in the making is requisite seems to be a question. It appears to have been considered by the author of the treatise on leases in Bacon's Abridgment, as settled law, that the concurrence of the wife during the coverture is immaterial; for he observes, that as she has no present right to contract, her joining in the lease cannot deprive her of what she does not possess; and it has no tendency, he adds, to bar her of a right which may accrue to her in case she survives her husband: and hence it is inferred, that where she is not privy to the deed, but the husband leases alone, his leases are capable of being affirmed after the coverture as if she had been a party to the demise. But this opinion seems to be only a deduction of that author from the acknowledged incapacity of a married woman to contract; and is not supported by the autho-

(*f*) *Burne v. Richardson*, 4 Taunt. Sheph. T. 301.

720. *Doe d. Beadon v. Pyke*, 5 M. and S.

146. *Barwick's case*, 1 Rep. 43. b.

5 Rep. 93. b. *Moor*: 393. *Webber v.*

Smith, 2 Vern. 103, and 16 Ves. 406.

Sheph. Touchst. 147. 301.

(*g*) But see *Co. Litt.* 233. b. *Prest.*

(*h*) *Baker v. Orlebar*, 2 Freem. 92, 115.

(*i*) *Doe d. Putland v. Hilder*, 2 B. and A. 782.

(*j*) *Walsall v. Heath*, Cro. Eliz. 656.

rities cited in the place alluded to. (k) On the other hand it is quite clear, that if the husband and wife join in a lease for years by indenture or deed poll of the wife's land, the wife may affirm or avoid it as she thinks proper after the coverture, (l) unless it is warranted by the stat. 32 Hen. VIII. c. 28. In pleading, indeed, it does not seem to be necessary to state such a lease to be by deed; for if it is material, the other party may shew the truth: but it is said, that if a lessee accept a lease from the husband and wife jointly during the coverture, he thereby admits both the husband and wife to have had a power to join therein, and consequently he must, during the coverture, declare as of a lease by them both as an essential part of the description of the lease by which he makes title. (m)

If the wife elects to avoid the lease, it will be so absolutely avoided that she may plead "*non demisit*," because no interest passed from her; but the lessee is in possession only by her husband's contract. (n) The reservation of rent seems to be a matter of no importance, since, after her husband's death, she may affirm the lease by acceptance of fealty. (o) Her power of election will descend to her heir or issue by a former marriage; but if the husband is tenant by the curtesy, the lease is good during his life. She cannot avoid a lease made by her and her first husband, if her second husband accepts the rent. (p) So if baron and feme make a lease for life, remainder for life, and after the death of the baron the wife accepts rent from the first tenant for life, this will affirm the remainder for life; and the same law is of the grants of an infant; for the whole is the same estate, and an agreement cannot be to a part of an estate, and not to the residue. (q) It seems however that by an express confirmation by deed, she may confirm one estate without the other: but an assent generally will enure to the benefit of both.

(k) *Wootton v. Hele*, 2 Saund. 180. b. note by Serjt. Williams. Bro. Accept. 10 ib. Leases, 24. *Browning v. Boston*, Plow. 137. b. *Jordan v. Wikes*, Cro. Jac. 332. *Parry v. Hindle*, 2 Taunt. 180. Co. Litt. 45. b. 3 Bac. Abr. 303.

(l) Bro. Accept. 6. Reccit. 70. Keilw. 10. a. Dy. 91. b. 146. b.

Greenwood v. Tyber, Cro. Jac. 564.

(m) *Wiscot's case*, 2 Rep. 61. b. *Bateman v. Allen*, Cro. Eliz. 438. *Jackson v. Mordant*, Cro. Eliz. 112.

(n) *Ubi supra*.

(o) 2 Rep. 61. b. Hutt. 102.

(p) Dy. 159. a. pl. 36. 3 Salk. 3.

(q) Plow. Qu. 237.

Where a mortgage was made in the form of a lease of a feme covert's estate by her and her husband, Lord Mansfield said that the conveyance, although in form a lease, was in substance a mortgage, and not being within the reason for which leases by a feme covert are held to be only voidable after coverture, it was absolutely void. (r)

Where a feme covert had been many years separated from her husband, and had received for her separate use the rents of her own property, which accrued to her by devise after the separation, it was held that she should be presumed to have received the rents and acknowledged the tenancy by the authority of her husband, and that the tenant was not liable again to her husband. (s)

If a man had enfeoffed another of his wife's land for life before the stat. 32 Hen. VIII. c. 28., after the death of her husband, she would have been put to her action of *cui in vita*: (t) but this is now altered by the purview of that statute; and consequently the wife and her heirs may enter after the decease of her husband notwithstanding such alienation. (u)

If the husband is possessed of a term in right of his wife, he has the power of disposing of it absolutely by grant or demise; and although he has no power of disposing of it by will, or charging it during his life, yet he may make an underlease to commence after his death. (x) So where (y) husband and wife were joint-tenants for sixty years, if they or either of them so long lived, and the husband by indenture leased for fifty years, to commence immediately,—this was held to bind the wife surviving, because the husband might have disposed of the whole, and it would have bound his wife; and therefore *a fortiori*, where he has disposed of part only, it shall be good against the wife surviving. So where (z) a long term of years was vested in the husband in right of his wife, and he granted an under-lease for ten years; and on borrowing money of the lessee he covenanted to grant him another after the first ten years should have expired, and died before the time arrived; it was held that this was a good disposition

(r) Goodright d. Carter v. Strahan,
Cowp. 201. Dougl. 52. n.

(s) Doe d. Leicester v. Biggs, 1.
Taunt. 367.

(t) Litt. s. 594.

(u) Co. Litt. 326. a.

(x) Anon. Poph. 4.

(y) Grute v. Locroft, Cro. Eliz. 287.

(z) Steed v. Cragh, 9 Mod. 43.

in equity, because the husband had the right to dispose of it, and the covenant was such a lien that it bound the right into whosoever hand the land passed. (a) The same rule holds good with respect to all chattels to which the husband is entitled in right of his wife, except guardianship in socage. If a feme guardian survives the baron, she may avoid the lease made by the baron during coverture; because she takes for the benefit of the infant, and is accountable to him for the management of the estate. (b)

If an executor or administrator dies without having administered the whole estate, it is not in the power of the executor of such executor or the administrator *de bonis non* to avoid any disposition of a term made by the executor or administrator during his life: but it seems to be a question, whether the administrator *durante minori ætate* of the executor or administrator can grant a term or any part of it absolutely; but any disposition of the estate till the executor or administrator arrives at a competent age seems to be good, because it shall be intended to be for his benefit, and is only voidable afterwards. (c)

Although the interest of a guardian is in some respects the interest of his ward, yet it seems to have been decided, after much consideration, that a lease made by a testamentary guardian for a greater number of years than the infancy of the ward is absolutely void upon his coming of age. (d) A lease by a guardian in socage may be rendered unavoidable by the assent of the infant after full age. (e)

Lay corporations aggregate or sole are not restrained by any general law from making absolute alienations of their property. The crown indeed is an exception whose grants are restrained by certain statutes, which will be mentioned in their place. Spiritual corporations aggregate are restrained by several statutes passed in the reign of Elizabeth.

The powers of spiritual corporations sole may be thus stated:

(a) *Oglander v. Baston*, 1 Vern. 396.

(b) *Osborne's case*, Plow. 293. a.

(c) *Price v. Simpson*, Cro. Eliz. 718.
Dubois v. Trant, 12 Mod. 436. *Freke v. Thomas*, Salk. 39. *Sir Moyle Finch's case*, 6 Rep. 67. b.

(d) *Roe d. Parry v. Hodgson*, 2 Wils. 129, 135.

(e) *Shopland v. Ridler*, Cro. Jac. 55, 98. *Brisden v. Hussey*, 2 Roll. Abr. 41. *Dugar v. Norton*, 1 Freem. 102.

Bishops and deans are considered in law as having the unqualified fee simple of their respective churches in themselves. Before the third council of Nice, A. D. 710. they might have bound themselves, and their successors for ever, by their sole alienation. And therefore leases for years, made by them at the common law, subsist after their death or removal: but their successors may avoid them by aid of the canons made at that council, which have received the sanction of our law. (*f*) Parsons and vicars, prebendaries and other ecclesiastical corporations sole, who are collative or presentative, and not elective, have not the unqualified fee simple of their possessions in right of their churches; leases for years, therefore, made by them of their sole authority, are absolutely void after their death or removal; nor can such leases by any means be made to subsist any longer. (*g*) Although ecclesiastical corporations sole can no longer discontinue, yet freehold leases made by them at the common law cannot be defeated without entry by reason of the livery of seisin, which is requisite to their creation at the common law.

The power of avoiding leases being found injurious to the interest of the lessee, and prejudicial to good husbandry, the stat. 32 Hen. VIII. c. 28. (*h*) was enacted, which enables three classes of persons to make indefeasible estates for lives or years within certain limits prescribed thereby, who could not do so before. The statute enacts, that all leases to be made of any manors, lands, tenements, or other hereditaments, by writing indented under seal, for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance in fee simple or in fee tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of any estate of inheritance made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them according to such estate, as is comprised in every such indenture of lease, provided that such leases are not made of any manors, &c. being in the hands of any fermor or fermors, by virtue of any old lease, unless the same old lease be

(*f*) Bro. Accept. 9, 10, 20. Confirmation, 17. Lease, 18, 32, 33. F. N. B. 50. Plow. 264. a. Poph. 120.

(*g*) Bro. Abr. Dean. 20. Lease, 19.

Higgins v. Grant, Cro. Eliz. 18. Overton v. Sydall, Poph. 120. Hodgskin v. Tucker, Dy. 239. a. Co. Litt. 341.

(*h*) Irish stat. 10 Ch. I. sess. 3. c. 6.

expired, surrendered, or ended within one year next after the making of the said new lease; nor to any reversion of any manors, &c.; nor of any manors, &c. which have not most commonly been letten to farm, or occupied by the fermors thereof by the space of twenty years next before such lease thereof made; nor for any period above the number of twenty-one years (forty-one years in Ireland) (i) or three lives from the making thereof; and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the said lands should have come, after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain according to their estates and interests, so much yearly ferm or rent as hath been most accustomably yielden or paid for the manors, &c. so to be letten within twenty years next before such lease thereof made. Nor can such leases be made dispunishable of waste. By the 4th sect. of stat. 32 Hen. VIII. c. 28. it is provided, that the act shall not give power to any persons to take more farms than he might have done, (see stat. 25 Hen. VIII. c. 13.) nor to any parson or vicar, to make any lease of the hereditaments belonging to their churches or vicarages, otherwise than they might have done. But this clause is not in the Irish Statute. (j)

Leases under this statute are not good if they exceed twenty-one years, or three lives from the making. Lord Hale thought that these words might sanction a lease to commence *in futuro*, if the term did not exceed twenty-one years from the making; but in Dy. 246. a. the Court differed on the point. (k)

Where a bishop made a lease for four lives, although one of the *cestuis que vie* died in the life of the bishop, yet the lease was void against the successor; for being void at the making, no subsequent accident could make it good. (l)

Three lives jointly are the measure of the estates for lives intended by the statute; and if there were no other reason for this interpretation, the last clause respecting waste would determine the point. Waste is either the actively destroying and abusing the premises demised, or permitting those parts, such as houses, to

(i) See the Irish Statute, *supra*.

(j) *Supra*.

(k) See Co. Litt. 44. a. Hale, MSS.

(l) The Bishop of Salisbury's case.
10 Rep. 61. b.

go to decay, where the tenant is by the law bound to repair. Both are tortious acts and violations of fealty. They were so considered before the statute of Gloucester: but the action of waste, usually so named, was given by that statute; by which action the owner of the inheritance, if no estate of freehold intervenes between his inheritance and the estate of the tenant committing waste, may recover the place wasted, and treble damages for the waste committed. A tenant is said to be punishable for waste, if he be liable to the penalties of this statute: but since a freehold interest intervening between the inheritance and the particular estate will preclude his bringing this action, and no other can bring the action, if the statute 32 Hen. VIII. c. 28. permitted an estate for three lives in remainder one after another to be made, the lease would in effect be a lease dispensable of waste; and the latter clause would be repugnant to the spirit of the statute.

A lease to three jointly for their lives, or to one for the joint lives of three, is all one under the statute; for three lives in both cases are the measure of the estate, which is all the statute requires. (*k*) So a lease for any number of years determinable on three lives is good within this statute: but this likewise involves another principle upon which the court proceeded in *Whitlock's case*; (*l*) namely, that where there is a general power to make leases absolutely followed by a restrictive clause of the nature of that contained in the statute, there all estates which are not against the intent of the restrictive provision are good, although not directly within the words of it.

With respect to the construction of the words, "that this act shall not extend to any lease of any manor, &c. which have not been most commonly letten or occupied by the farmers thereof, for the space of twenty years next before such lease made," it has been determined, that if the lands or tenements have been let for eleven years at several times or at once within twenty years before the making, it is sufficient: but this must have been by some person who had an estate of inheritance in the premises; because tenants for life, in dower, or by the curtesy, have too great a temptation to convert

(*k*) *Baugh v. Hains*, Cro. Jac. 76.
Mornington v. Trye, Cro. Eliz. 111.
Roos v. Owdwick, Moor. 398. *Web-*

ster v. Allen, Moor. 677. *Dale's case*,
 Cro. Eliz. 182.

(*l*) 8 Rep. 70. b.

all into rent for immediate profit.^(m) So it has been held that a letting to farm by the king of the demesnes of a bishopric during the vacancy will not enable the successor to lease within the statute after restitution of the temporalities.⁽ⁿ⁾ It seems, likewise, to follow from what has been said, that if a tenant in tail or bishop keep such lands in his hands for twenty or fifteen years, they are not demisable again within the statute to bind the heir or successor, till they have been leased or occupied by farmers for eleven years more.^(o) Lands demised at will are lands accustomedly letten; and since copyheld estates are estates at will, they are within the statute, and demisable at the rent at which they have been demised by copy.

It was formerly held that leases upon this statute, to bind the successor, must be of lands or other hereditaments of a corporeal nature, to which recourse might be had by distress for rent arrear: but this rule was always understood with some qualifications. Tithes in the hands of ecclesiastical persons always formed an exception; ^(p) and the stat. 32 Hen. VIII. c. 7. s. 7. placed tithes in the hands of lay impropriators on the same footing as their corporeal hereditaments. But this only extended to leases for years of tithes; for all the books ^(q) agree that a lease for lives of tithes, or any other incorporeal hereditaments, would not have bound the successor, if made by an ecclesiastical person, either by virtue of the statute or at the common law, because he could not distrain; and at the common law there was no action of debt for rent on a freehold lease during its continuance, and therefore there was no remedy for the rent arrear. This objection is now entirely removed as to tithes and all other incorporeal hereditaments, by the stat. 8 Ann. c. 14. s. 4. ^(r) and the stat. 5 Geo. III. c. 17. The first gives an action of debt for rent as between landlord and tenant on freehold leases, in the same manner as in the case of a lease for years; and the stat. 5 Geo. III. c. 17. declares that freehold leases

^(m) Dy. 77. b. 206. b. 271. b. Co. Litt. 44.

⁽ⁿ⁾ The Bishop of Oxford's case, Palm. 175.

^(o) Mallet v. Mallet, Cro. Eliz. 708. Pemble v. Stern, 1 Lev. 212. Enc. Abr. Leasr. F. 2. Rule 6.

^(p) Bally v. Wells, 3 Wils. 32. Dean and Chapter of Windsor v. Gover, 2 Saund. 304.

^(q) Jewel's case, 5 Rep. 3. Valentine v. Denton, Cro. Jac. 111. Rickman v. Garth, Cro. Jac. 173.

^(r) Irish Stat. 9 Ann. c. 8. s. 5.

of all their incorporeal hereditaments by ecclesiastical persons are within the statute, and gives debt for rent if arrear and unpaid for 28 days during their continuance. (t)

The effect of the act 32 Hen. VIII. may be succinctly stated thus: that husbands seised in right of their wives of an estate of inheritance in fee simple or fee tail, or jointly with their wives either before or after coverture, tenants in tail and all sole corporations ecclesiastical, seised in fee simple in right of their churches, except parsons and vicars, may make leases for three lives or twenty-one years, of lands accustomably letten, according to the mode prescribed by the statute, without the concurrence of any other person; and such leases are declared to be good against the wives and their heirs, the issue in tail, and the successor in the several cases there respectively mentioned. By the words of this statute the wife is appointed to join only where she has the sole inheritance: but if she has a joint estate of inheritance with her husband, a lease by her husband alone is good by the body of the act, and the proviso (u) which follows does not extend to it. The words are: "That all leases made by any person or persons having an estate of inheritance in fee simple or fee tail in right of their wives, or jointly with their wives of an estate of inheritance, made either before or after coverture, shall be good: provided that the wife be made a party to every lease to be made by her husband of any manors, lands or hereditaments, being the inheritance of the wife, and that every such lease be made by indenture in the name of the husband and wife, and she to seal the same; and that the rent be reserved to the husband and the heirs of the wife according to her inheritance therein."

This statute, although it has enabled tenants in tail to bind the issue in tail, has made no alteration with respect to the remainderman or reversioner: indeed it seems cautiously to have avoided giving persons the power of making indefeasible leases, whose grants before that statute were absolutely void upon the determination of the interests of the lessors. A lease, however, for three lives under the statute creates no discontinuance, but determines with the estate tail. (v) Neither does the statute extend to

(t) No Statute in Ireland to this effect.

(u) Stat. 32 Hen. VIII. c. 28. s. 3.

(v) *Keen v. Cope*, Cro. Eliz. 602. Noy. 66. Anon. Sav. 77. Co. Litt.

333. a. Anon. Godb. 9. *Salvin v. Clark*,

any but vested estates tail; therefore where an estate was made to the husband and wife, and the heirs of the body of the survivor, a lease made according to the statute was held not to bind the issue in tail, because the estate tail was a contingency at the making of the lease. (x)

Prebendaries seised in right of their prebends are considered within the equity of the statute. (y) So, likewise, are the chancellor, treasurer, archdeacon or precentor of a cathedral church, for they are all prebendaries, and have those offices annexed: and though the chancellors and treasurers are in some respects ministerial, yet they are not *inter minores ordines* as vergers, and those called *ostiarii*. So chanters and singers are *minoris ordinis*, but a precentor is *majoris ordinis*. (z)

By the common law all ecclesiastical persons, with the concurrence of those who were required by law to confirm their acts, had ample power to alien their possessions. Deans and chapters, masters and fellows of colleges, and other similar corporations aggregate of themselves alone, without the concurrence of any other person, had the power of making long leases for years or lives, gifts in tail, or even alienations in fee simple: but bishops, deans and others seised in right of their churches, archdeacons, prebendaries, parsons and vicars, if they aliened, must have had the confirmation of others without which their grants were either void or voidable against their successors. (a) The stat. 32 Hen. VIII. made no alteration in this respect; (b) for till the stat. 1 Eliz. c. 19. notwithstanding the stat. 32 Hen. VIII. it was in the power of the sole corporations mentioned in the former, to make even absolute alienations of their possessions, provided their grants had the requisite confirmation; although without such confirmation they could not make leases even for twenty-one years to bind their successors, except within the provisions of the stat. 32 Hen. VIII.

Cro. Car. 156. is misreported according to Vaugh. C. J. See Vaugh. 383. But see Sawle v. Clarke, W. Jon. 208. Vernon v. Staveley, 4 Leon. 191. 1 Leon. 268. pl. 361. 4 Leon. 118. pl. 238.

(x) Lampet's case, 10 Rep. 51.

(y) Acton v. Pitcher, 4 Leon. 51.

Watkinson v. Mann, Cro. Eliz. 350.

(z) Brisco d. Stroud v. Holt, 1 Lev. 112. Bill d. Stroud v. Holt, 1 Keb. 576. Gibs. Cod. 767. 3 Salk. 143.

(a) Compl. Incumb. 415. Mallory, *Quare impedit*, 47. Wither v. The Dean of Winchester, 3 Meriv. 421.

(b) See 10 Rep. 60. a.

To prevent therefore bishops and other ecclesiastical persons from doing acts of this kind to the prejudice of their successors, the restrictive statutes of the 1 and 13 Eliz. were framed. The stat. 1 Eliz. c. 19. restrains all archbishops and bishops from making any alienations of the possessions of their churches, other than to the queen her heirs and successors, for any estate other than for twenty-one years or three lives, from such time as any such lease, grant, or assurance shall begin, and whereupon the old accustomed yearly rent or more shall be reserved and payable during the term or lives. The stat. 13 Eliz. c. 10. in the same way restrains all other ecclesiastical persons, whether corporations sole or aggregate; and the exception with respect to the quantity of estate is to the same effect as that of the stat. 1 Eliz. c. 19. By the fourth section of the same act it is provided, that the act shall not extend to colleges in the two universities or elsewhere, who are restrained by private statute. The stat. 1 Eliz. c. 19. is a private act, and must be specially pleaded. (c)

Neither of these two statutes have been materially altered: the latter has always been construed largely to prevent all evasions of its true meaning and intent. (d) Therefore by whatever names such corporations are instituted, or even should they be temporal for the encouragement of the liberal arts or sciences, or mixed in their nature partly spiritual and partly temporal, they are within the intent of the statute; it is admitted, however, that corporations aggregate consisting of mayor and aldermen, bailiff and burgesses, and such other lay corporations, are free from all restraints other than the general laws of the realm. (e)

Hospitals and houses for the poor are provided for by a special act of the 39 Eliz. intituled, "An Act for erecting hospitals, or abiding or working houses for the poor." And it is thereby enacted among other things, "that all leases, grants, conveyances, or estates made by any corporation so to be founded exceeding the number of twenty-one years, and that in possession, and whereupon the accustomed rent, or more by the greater part of twenty years next before the making of such lease, shall not be reserved, shall be void. (f)

The permission in the stat. 1 Eliz. c. 19. to bishops to grant to

(c) Moor. 107. 5 Rep. 2. b.

(e) 1 Sid. 162.

(d) Magd. Coll. case, 11 Rep. 76.

(f) Stat. 39 Eliz. c. 5.

the queen and her successors, as before the statute, was found in many cases to render the statute itself ineffectual, because estates were often granted to the crown with a design that the crown should grant them over to others. (g) The stat. 1 Jac. I. c. 3. expunged that clause; and since the stat. 13 Eliz. c. 10. extends to restrain grants to the crown, though the queen is not named, (h) grants to the king his heirs and successors are not more privileged than grants to any other persons. (i)

The stat. 14 Eliz. c. 11. has in effect repealed the stat. 13 Eliz. c. 10. as far as respects houses in cities and towns, and the lands adjoining them: for it allows such spiritual corporations as were restrained by the stat. 13 Eliz. c. 10. to demise any houses situated in any city, borough, town corporate or market town, or in the suburbs of any of them, and the grounds adjoining, in such manner as by law and the private statutes of such corporations they might have done before the stat. 13 Eliz. c. 10. provided that such house be not the capital or dwelling house of such persons, nor has ground belonging to the same above the quantity of ten acres. And it is further provided, that no leases shall be made of such houses in reversion, nor without reserving the accustomed rent at least; nor without charging the lessee with reparations; nor for a longer term than forty years. This statute has made no alteration in the stat. 1 Eliz. c. 19. Therefore archbishops and bishops are still under the same restrictions with respect to houses in cities and towns as they are with respect to their other possessions: but the stat. 14 Eliz. c. 11. is a general law, and must be construed as beneficially for the public good as the stat. 13 Eliz. c. 10. By this act it is declared, that the words "master and guardian of any hospital," contained in the above mentioned act 13 Eliz. c. 10. mean all hospitals, *maisons de Dieu*, and all houses for the relief of the poor.

All leases made according to the exception of these statutes, and not warranted by the stat. 32 Hen. VIII. c. 28. if made by bishops or any other sole spiritual corporation, must be confirmed by the dean and chapter, and others who are required by law to confirm their grants: for leases for twenty-one years or three lives, being only exempted from the general disability imposed by

(g) 11 Rep. 71. Gibs. Cod. 679.

(i) 5 Rep. 14. a.

(h) 11 Rep. 89. b.

these statutes, derive no sanction from them to cause them to be made without such concurrence. (*k*)

In most respects leases made according to the exceptions of these statutes must be conformable to the provisions of the stat. 32 Hen. VIII. (*l*) They must be by indenture, and strictly in possession; they cannot exceed twenty-one years or three lives: but a lease for ninety-nine years determinable on three lives, although permitted by the nature of the power given by the stat. 32 Hen. VIII., is not within the exceptions of the stat. 1 Eliz. and 13 Eliz.; and the distinction taken is between a particular power affirmative, and a general power restrictive or negative. (*m*) The power given by the stat. 32 Hen. VIII. is of the latter kind; for the act in the first instance makes good all leases and grants, provided they do not exceed twenty-one years or three lives; and therefore a lease for ninety-nine years determinable on three lives is good, because it cannot exceed three lives. The exceptions of the statutes of Eliz. are said to be the reverse of this; for the first part of these acts makes void all estates made by persons therein mentioned, and the last part saves only leases for twenty-one years or three lives; therefore leases for ninety-nine years determinable on three lives are void by the first part of these acts, and not within the saving in the latter part, because they are neither for twenty-one years nor three lives. (*n*) There is no restriction as to the nature of the hereditaments to be demised; but with respect to rent, and the necessity of the lands to be demised having been most commonly letten, the provisions of the stat. 32 Hen. VIII. must be strictly followed. So, although it has not been expressly provided that leases within the statutes 1 and 13 Eliz. shall be without impeachment of waste, yet it has been resolved that the several persons therein mentioned are by the equity of these statutes restrained from making leases punishable for waste.

The greatest deviation which has been admitted from the stat. 32 Hen. VIII. respects concurrent leases for years. It is obvious that such leases would be contrary to the express provision of the

(*k*) The Bp. of Hereford *v.* Scory, Cro. Eliz. 374.

(*l*) Bp. of Sarum's case, 10 Rep. 60. b.

(*m*) Whitlock's case, 8 Rep. 70. h.

(*n*) 3 Keb. 595. Gee *v.* Pagot, Amb. 200. Roe d. Brune *v.* Prideaux, 10 East, 153.

stat. 32 Hen. VIII. But it has been determined, that if a bishop make a lease for years of his sole authority in pursuance of the stat. 32 Hen. VIII., and afterwards at any time during the continuance of that lease make a new lease to another according to the exception of the stat. 1 Eliz. c. 19. this lease if confirmed is good against the successor, because it is good at law, and not void within the exception; for it is good only by estoppel for so many years as were to come of the first lease, and the lessee of the concurrent lease can have no beneficial interest till after its expiration; therefore in effect, against the successor, there is no more than a lease for twenty-one years in being. (o) But after a lease for three lives made pursuant to the stat. 32 Hen. VIII. a bishop cannot make a lease for years to be good by way of a concurrent lease, though it be confirmed: nor *e converso* can he make a lease for three lives as a concurrent lease, after a lease for years pursuant to the statute, because this is against the words of the exception of the stat 1 Eliz. which are "other than for three lives or twenty-one years." So that there ought to be only one or the other in being against the successor, and not both at once. (p)

Deans and chapters, masters and fellows of colleges, could have made concurrent leases in the same way as bishops are able to do till the stat. 18 Eliz. c. 11. was enacted to restrain their power in this respect. That statute has declared that all leases made within the exception of the statute 13 Eliz. c. 10. of lands whereof any former lease is in being, and not expired, surrendered and ended within three years next after the making of any such new lease, shall be void. It may be here remarked with reference to this statute, as also to a similar provision in the stat. 32 Hen. VIII. c. 28.; that if the second lease be for years, though four, five or more years of any former lease are to come and unexpired, yet if the former lease is surrendered or otherwise determined within the three years, or one year limited by these statutes respectively, the second lease will be good: (q) but if the first lease is for years, and the second is for lives, then the second lease will be void against the successor, though never so short a period of the old lease is unexpired; because it is against the express words of the

(o) Fox v. Collier, Moor. 107. See 141.

3 Keb. 378.

(q) Grumbrell v. Roper, 3 B. and A.

(p) Marler v. Wright, Cro. Eliz. 711.

statute, that both should be in being at the same time. (r) The surrender intended by the statutes must be absolute, and not conditional; for otherwise the intention of the statute might be easily evaded by setting up the old lease upon the breach of the condition. (s) The stat. 18 Eliz. c. 11. is held not to extend to the 1 Eliz. c. 19. because it enumerates inferior spiritual corporations, and the better opinion is that it does not include the stat. 14 Eliz. c. 11. This last expressly forbids all leases in reversion; and since concurrent leases are leases in reversion for so much as remains after the expiration of the prior lease, they are expressly against the intention of this statute. (t) The stat. 18 Eliz. c. 11. is a private law, and must be pleaded specially: but the stat. 13 Eliz. c. 10. is a public and general law. (u)

It seems formerly to have been held, that leases made according to these statutes could not be renewed without a surrender of all the underleases derived out of them: but now it is enacted by the stat. 4 Geo. II. c. 28. s. 6. (x) that if the original lease is duly surrendered in order to be renewed, and a new lease made, the same shall be good and valid without the surrender of underleases, and without prejudice to the rights of the parties.

In addition to the foregoing statutes, it has been enacted by the stat. 18 Eliz. c. 6. that no master or other superior of any of the colleges in the universities, nor any provost or warden of the colleges of Winchester or Eton, nor the corporation of the same, shall make any lease for lives or years of their lands, to which any tithes, arable land, meadow or pasture shall appertain, except one third of the old rent be reserved in corn. In the third section of this act an exception is made of leases made by the master and fellows of St. John's College, Oxford, of the manor of Fyfield, to any heir male of Sir Thomas White, founder of the said college, within the meaning of the foundation, and statutes of the same.

(r) *Elmer's case*, 5 Rep. 2. *Small's case*, Degg. 130.

(s) *Wilson d. Byre v. Carter*, 2 Stra. 1201.

(t) *Hunt v. Singleton*, Cro. Eliz. 564. *Thomson v. Trafford*, Poph. 8. *Wyn v. Wild*, Cart. 9. *Compl. Incumb.*

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(u) *Kempe v. Hellingbrook*, 1 Leon. 19. 1 Leon. 306. *Holland's case*, 4 Rep. 76. *Dumpor's case*, 4 Rep. 120.

(x) *Irish Statute*, 5 Geo. II. c. 4. s. 1.

By the stat. 22 Ch. II. c. 11. s. 61. the dean and chapter of St. Paul's, London, are enabled to make leases to the city of London of certain lands let out for holding Newgate market in the city of London for the term of forty years, and so from forty years to forty years for ever, according to the provisions of that act. By the same act, parsons and vicars of parishes within the city of London are empowered to make building leases, with the consent of the patron and ordinary, of their glebe lands within the said city, for any term not exceeding forty years, at such yearly rents without fine as can be procured for the same.

Parsons and vicars being excepted out of the stat. 32 Hen. VIII. c. 28. cannot of their own sole authority make any leases to bind their successors. Notwithstanding therefore such leases may be conformable to the exception of the stat. 13 Eliz. c. 10., they still remain at common law, and require the confirmation of the patron and ordinary to make them subsist after the death of the incumbent: (a) but with such confirmation they may be good, though made to commence after his interest ceases by death or otherwise. (b)

A lease, however, by any sole spiritual corporation, though confirmed by those who are required to confirm their grants, is not binding on the successor if made before such spiritual person is invested with the temporalities belonging to his benefice. A bishop therefore before he receives his temporalities from the king, or a parson, vicar, or prebendary, before induction, cannot make leases which shall be binding on the successor, although they should be properly confirmed. (c) It is said further, that a bishop cannot charge his temporalities before consecration, because he is not a bishop in the legal sense of the word till after that ceremony. (d) On the other hand since, where the incumbent of a living is made a bishop, there is no vacancy till his consecration, (e) a lease made by such an incumbent, if properly confirmed, seems to be good against the successor.

If a bishop or other incumbent is in by superinstitution as in the common case of plenary, the bishop who is in by superinstitution, or the incumbent of a church which is full, cannot charge

(a) Co. Litt. 44.

(d) Dy. 221. b.

(b) Dy. 69. a.

(e) The King v. The Bp. of London,

(c) Hare v. Bickley, Plow. 528.

Carth. 313.

the possessions of the church so as to bind the successor ; although, for public convenience, all his acts in a spiritual capacity are valid to all intents and purposes. An instance of superinstitution in the case of a bishop occurred in queen Mary's time, where A. was lawful bishop of Ossory, in the reign of king Edward VI., and afterwards in the time of queen Mary B. was consecrated bishop of the same diocese during A.'s life, who was not deprived. (g) It has been however determined that, in the case of a lease of the possession of a rectory or vicarage, the lessor need not be a priest ; for if a mere layman is admitted, instituted, and inducted, a lease for years made by him, and confirmed by the patron and ordinary, will remain good after the death or removal of the incumbent, because it was made by a parson *de facto*, who was admitted by the solemnities of institution and induction ; and the people could take cognisance of no other. (h) Leases made by a simoniacal parson are also good by the stat. 1 W. and M., st. 1. c. 16. if made for valuable consideration, and *bond fide*. (i) No statute, however, has restrained the offence of simony in Ireland, either by civil forfeitures or otherwise : it is punishable there only by spiritual censure.

The grants of ancient offices are not within any of the before-mentioned statutes relating to ecclesiastical persons : they may therefore be granted as they were before, with the confirmation requisite to all their grants, (k) to bind their successor. Neither do any of these statutes relate to rectories and tithes which are inappropriate, and are lay fees : but such lay impropriators may dispose of them like any other kind of hereditaments. Such impropriations, however, in the hands of bishops, colleges, and other ecclesiastical persons, are not excepted from the restraints affecting any other species of property they possess.

By the general Inclosure Act, 41 Geo. III. c. 109. s. 38. parsons and vicars are empowered to make leases of their allotments

(g) The Bishop of Omory's case, Cro. Jac. 552. 1 Roll. Abr. 477. 533.

Year Book, 9 Hen. VI. 34. a.

(h) Costard v. Winder, Cro. Eliz.

775. Dr. Harscot's case, Comb. 302.

Dy. 292. b.

(i) See Booth v. Potter, Cro. Jac. 533.

(k) Bishop of Sarum's case, 10 Rep.

60. Ridgley v. Powell, 1 Freem.

394.

under inclosure acts, by indenture under hand and seal with the consent of the patron and ordinary, for any term not exceeding twenty-one years, to commence within twelve calendar months next after the executing the award; so that the rent be reserved to the rector or vicar for the time being, by four equal quarterly payments in every year; the rent being the most improved or best rent which can be obtained for the same without taking any fine or other consideration for granting the lease, and so that the lessee be punishable for waste; and also subject to a power of re-entry for non-payment of rent within a reasonable time to be then limited after the same shall be due, and so that the lessee execute counterparts of every such lease.

Before we proceed to the statutes which restrain grants of the crown, it is necessary to explain the mode by which these transactions are carried on between the crown and the subject. Leases by the crown are usually by letters patent under the great seal, or the seal of the Exchequer. Freehold leases are not now grantable of the possessions of the crown, except in a very few cases: if they are so, they should regularly be only under the great seal; but in consequence of its being ascertained to be the usual course of the Exchequer, and the multitude of precedents there, leases for lives by the treasurer or chancellor of the Exchequer have been always allowed under the Exchequer seal; and other courts are bound to take cognizance of the practice of that court. (m) The lord treasurer or the lords commissioners of the king's treasury have no such privilege at the common law, and are only enabled to lease in certain cases by the special provisions of particular acts of parliament. They are in this way empowered to let to farm certain duties for the king's benefit. (n) But some later acts give them a superintendence over the demises of the crown lands generally. (o) In the case of freehold leases by the crown no livery is necessary, because the letters patent carry with them a livery.

The duchy of Lancaster has its own peculiar seal, which is the

(m) *Lane's case*, 2 Rep. 16. *Kempe v. Bernard*, Cro. Car. 169. *Lord Monson v. Bourn*, Cro. Car. 528. *March*, 55. *Predyman v. Wodry*, Cro. Jac. 109.

(n) See stat. 12 Ch. II. c. 23. Stat. 12 Ch. II. c. 25. Stat. 27 Geo. III. c. 26, &c.

(o) Stat. 34 Geo. III. c. 75. Stat. 48 Geo. III. c. 73.

seal of the duchy court in Westminster. There appears likewise to be a seal for the county palatine, distinct from the duchy seal: for there are lands out of the county palatine, which are nevertheless part of the duchy: and these are appurtenant to the duchy without being liable to the exercise of palatine rights. Any corporeal or incorporeal hereditaments therefore which are part of these extraneous possessions of the duchy not lying within the county palatine may be granted under the duchy seal. The seal of the county palatine is of record in the same way as the great seal of England; and grants within the jurisdiction made under the seal of the county palatine have the same effect as grants made by the king *jure coronæ*. If therefore the king under this seal grant letters patent conveying a freehold interest, the letters patent carry with them a livery like other letters patent. The duchy seal is also of record in respect of the honour of the person of the king: but in the case of a freehold lease of duchy lands, not within the county palatine under the duchy seal, livery of seisin is said to be requisite, which may be performed by attorney. (p) Lands lying within the county palatine, and forfeited to the crown by reason of a grant made of them to superstitious uses, may be granted under the great seal; for the forfeiture accrues to the king *jure coronæ*, and therefore the lands form no part of the duchy or county palatine. (q)

Leases by the crown are placed nearly on the same footing as those by ecclesiastical persons by the stat. 1 Ann. st. 1. c. 7. s. 5. It is there enacted that all leases by the crown shall be void, unless they be made for some estate not exceeding one and thirty years, or three lives, (r) or some term of years determinable on one, two, or three lives, to commence from the making; or if such grant, lease, or assurance shall be made to take effect in reversion or expectancy, then the same, together with the estate in possession, shall not exceed the term of thirty one years or three lives in the whole. Such leases likewise are to be made without impeachment of waste, and with the reservation of the ancient or usual rent or more, to

(p) *Carpenter v. Marshall*, 1 Keb. 5 Bro. P. C. 1. Ed. Toml.
643, 713. *Astell v. Clark*, 2 Lutw. (r) But see stat. 48 Geo. III. c. 73.
1233. s. 3.

(q) *Woollaston v. The Atty. Gen.*

the king, his heirs and successors; or such rent as has been reserved and paid for the hereditaments demised for the greater part of twenty years before the making of such leases: and where no rent shall have been reserved, then there shall be reserved a reasonable rent, not under the third part of the clear yearly value of the demised premises. This act extends to every species of hereditaments freehold or copyhold, legal or equitable, in England or Wales which can be called the property of the crown, either in right of the crown or of a county palatine, except advowsons of churches and vicarages. Parts, however, of this act have been repealed, especially as to the quantity of estate allowed to be granted.

The statute 34 George III. c. 75. has repealed the statute 1 Ann. st. 1. c. 7. as far as respects building leases; and enables the lords of the treasury, in behalf of the crown, to grant land within the ordering and survey of the Exchequer in England, for building, for ninety-nine years, or three lives,^(s) where the lessees agree to make erections of greater value than the land, or where the greater part of the yearly value of the premises consists of buildings, to commence from the making; or if any such lease shall be made in reversion, then the term to be granted, together with the term in possession, not to exceed ninety-nine years, or three lives,^(t) from the making. By this act it is likewise provided, that where there shall happen to be any substantial building or buildings on the ground to be demised, or where such buildings shall not require to be rebuilt, the annual rent, being not less than two-third parts of such annual sum as shall be deemed a reasonable rent for the same, shall be reserved to the king, his heirs and successors; and a fine or fines to the amount of the remaining part of such annual sum as aforesaid, shall be paid to the use of the king, his heirs and successors, subject to a discount, which shall not be computed at a higher rate than the highest legal rate of interest at the time of making the lease. And where there shall happen to be no substantial building upon the land, or that such building or buildings require or are intended to be rebuilt, or other new buildings are to be erected, then such annual rent shall be reserved as

(s) See stat. 48 Geo. III. c. 73. s. 3.

(t) But see stat. 48 Geo. III. c. 73. s. 3.

shall be deemed reasonable, without any fine, so as in every such lease there be inserted a covenant on the part of the lessee to erect proper and substantial buildings within a reasonable time, and such other covenants for keeping buildings in repair, and other acts as shall be deemed reasonable; and so as all and every such rent and rents be reserved to be paid free of all taxes and assessments whatsoever, for and during the whole of the term or terms so demised, except such rent during such part of such terms as the commissioners of the treasury shall in any case think fit to be allowed, not exceeding in any case the term of three years; and so as every such lessee sign, seal, and deliver, a counterpart of his lease—which counterparts are exempted from stamp duty. The fourth section of the same act enacts, that on every lease under the great seal, or the seal of the Exchequer of crown lands (except advowsons of churches and vicarages, and such tenements and grounds, with edifices and buildings erected thereon, as are by the present act authorised to be granted for any term not exceeding ninety-nine years or three lives, (x) and whereon any fine or fines shall be payable as aforesaid,) there shall be reserved such clear annual rent or rents as shall be deemed by the lord high treasurer or commissioners of the treasury a reasonable rent without taking any fine to be payable to the king, his heirs and successors, during the whole of the term granted; and no such lease shall be good without such counterpart as aforesaid, which shall be free from stamp duty.

By the stat. 39 and 40 Geo. III. c. 88. it is provided, that none of the provisions of these acts shall extend to property purchased by the king or his successors out of the privy purse, or such property as shall not have come to them in right of the crown: and it is enacted that the king may sell and devise such estates in the same way as subjects in similar circumstances; and the same power is given to the queen consort during the joint lives of the king and queen.

By the stat. 48 Geo. III. c. 73. s. 23. it is provided, that where houses are to be rebuilt or newly erected, on land on which there are other houses not intended to be rebuilt, the lords of the treasury shall ascertain the rent and fine, regard being had to the

(x) But see stat. 48 Geo. III. c. 73. s. 3.

value of the building on the ground, and the proportion it bears to the whole value; and where (y) they shall be of opinion that the solidity and value of any such old house or houses, not intended to be rebuilt, is sufficient security for the due payment of the whole annual sum, deemed by them a reasonable consideration for such building and ground held therewith, they may direct the whole of such consideration to be taken in rent without any fine. It is likewise enacted by s. 25. that in respect of any lease under the great seal, or the seal of the Exchequer, of any houses or buildings, which shall be certified by surveyors not to require rebuilding, and which shall be of a greater yearly value than the ground on which they are built, but which the lessee may wish to pull down in order to erect other buildings of greater value for his own accommodation or the advantage of houses or other buildings which may have been destroyed or damaged by fire on ground on which such buildings have been erected; and also of houses and other buildings which shall only be in part rebuilt, or to which new buildings shall be added; and also of ground to be granted as garden or curtilages to houses, whether on crown or private land; the lords of the treasury may lease either on rent only, or by fine and rent, provided that the fine shall not exceed one third of the net annual value of the premises, or be computed at more than the highest legal rate of interest.

By the fifth section of 34 Geo. III. c. 75. it is enacted that no crown lease shall be renewed for any term of years whatever, until within five years of its expiration; except such tenants as are by the present act authorized to be granted for any term not exceeding ninety-nine years, in which case they may be renewed within twenty years of its expiration: nor can any lease for lives be renewed so long as there shall be more than one life in being, except in the cases thereafter mentioned. These exceptions are enumerated in the sixth section. The only one which seems to be of importance at this distance of time from the passing of the act, is one relating to tithes or other profits *à prendre*: with respect to which it is provided, that if the lessee of tithes or other profits arising from the land be also the owner of the land, the lords of

(y) Stat. 48 Geo. III. c. 75. s. 24.

the treasury may renew such leases at such times as appear to them convenient for the beneficial enjoyment of the tithes or other profits, together with such lands respectively. It is however enacted by the stat. 48 Geo. III. c. 73. s. 19. that where any house or other building shall require to be rebuilt, or any new house or other building to be erected on crown land, within the ordering and survey of the Exchequer, held under lease from the crown, upon which other houses or buildings shall be standing, if the lessee shall covenant or agree to build a new house or building, or to rebuild a house or building, of such value as to increase the value of the whole property included in such lease, it shall be lawful at any time or times hereafter to grant any further or other lease of all such land, with the houses and buildings thereupon, as were included in the former lease for any term or estate (except for life or lives,) (s) not exceeding the terms and estates authorized by the same statute 34 Geo. III. c. 75., and under the same regulations.

Where any wastes, commons, or other uninclosed lands of the crown, are divided and inclosed by act of parliament; or where any crown lands in lease shall be deemed by the lords of the treasury fit for planting, or any farm-house or other substantial building shall be deemed necessary to be erected for the improvement of crown lands; or any pits, shafts, watercourses, engines, or other works to be dug, sunk, erected, or made for the better working any mines, quarries, or collieries belonging to the crown; and where the term or estate in possession shall be deemed by the lords of the treasury insufficient to repay the costs of such improvements with reasonable profit to the parties making the same, such leases may be renewed for any estate not exceeding the terms or estates authorized to be granted by the stat. 1 Ann. st. 1. c. 7., or by the stat. 34 Geo. III. c. 75. (a) So where any houses or other buildings require rebuilding, or any new houses or other buildings are to be erected, or where any such houses or buildings have been erected, and the term or estate in possession shall not be deemed sufficient by the lords of the treasury to repay the costs with reasonable profit to the lessee, such leases may be renewed in like manner for any term not exceeding the term allowed by the same act or the statute

(s) See stat. 48 Geo. III. c. 73. s. 3.

(a) S. 7.

1 Ann. st. 1. c. 7. (b) By the stat. 48 Geo. III. c. 73. s. 22. the power given by this section of the stat. 34 Geo. III. c. 75. with respect to wastes or uninclosed grounds is extended to other lands or grounds comprised in the same lease with such uninclosed grounds or wastes.

By the stat. 48 Geo. III. c. 73. s. 26. the lords of the treasury may reserve as a rent of mines, collieries, and quarries, part of the produce in kind, or a duty on the value, as they think proper. It is, however, provided by the eighth clause, that before the making of any lease under the great seal, or the seal of the exchequer, a survey of the premises, and an estimate of the improved annual value, shall be made under the order of the lords of the treasury; and such survey shall be certified upon oath by the person making it: but leases of hereditaments of a known fixed and unimproveable value may be renewed without survey. (c) The nineteenth section of the same act, after reciting that whereas it might be expedient to permit the lessees of lands under the authority of this act to alien the lands so demised in parcels, and for that purpose to surrender the subsisting lease, or grant thereof, for the purpose of obtaining distinct leases of several parcels, reserving in the whole the same rent as shall have been reserved by such surrendered lease or more, enables the crown upon such surrenders to make new leases of the same lands in parcels, for the same rents or more, and upon the same conditions as the lease surrendered. The preamble of this act states it to relate only to crown lands within the ordering and survey of the exchequer: it is, however, expressly provided by s. 20. that it shall not affect the power of the chancellor and council of the duchy of Lancaster.

The stat. 52 Geo. III. c. 161. repeals the stat. 1 Ann. st. 1. c. 7. so far as respects lands within the ordering and survey of the chancellor and council of the duchy of Lancaster, fit and proper for the erection of houses or other buildings thereupon, or for gardens, yards, or appurtenances, to be enjoyed with the same; and makes enactments respecting them similar to the stat. 34 Geo. III. c. 75. under the direction of the chancellor and council of the duchy of Lancaster; and this act includes all property of the crown of this nature in the duchy, whether in the county palatine

(b) Stat. 34 Geo. III. c. 75. s. 7.

(c) Stat. 34 Geo. III. c. 75. s. 9.

or not. By a previous statute however, namely, the stat. 48 Geo. III. c. 73. it had been enacted, that lands belonging to the duchy fit for gardens or appurtenances to houses erected on crown lands, might be demised under the great seal, or the seal of the exchequer, or the seal of the duchy and county palatine of Lancaster, for any term not exceeding ninety-nine years from the making; or if any such lease should be made in reversion, then that the term to be granted, together with the estate in possession, should not exceed ninety-nine years, provided (*d*) that no land should be so granted for a longer term than the term for which the house or building to which such land should be annexed should be holden. By the 52 Geo. III. c. 161. s. 3. a form of the lease in this case is specified in schedule D., and the power is extended to any lands which may be conveniently held with such houses at a reasonable rent, without fine.

By the stat. 48 Geo. III. c. 73. s. 3. no leases of any crown lands within the ordering and survey of the exchequer can be granted for any life or lives, except such leases for lives as are authorized by the stat. 44 Geo. III. intituled "An Act for inclosing lands in Great Staughton, in the county of Huntingdon." By ss. 4 and 5 of the same act, crown leases for gardens may be renewed in the same way as leases of houses by the stat. 34 Geo. III. c. 75. s. 5, 6. By the stat. 48 Geo. III. c. 73. s. 7. in all cases where any lease may be renewed under the stat. 34 Geo. III. c. 75. or by this act, it is lawful to make any new lease upon surrender of the old one, for such term, and upon the same conditions, as if the same had been renewed under the provisions of the said stat. 34 Geo. III. c. 75. or this act, and had not been first surrendered. All charges and expenses of any new lease made upon the surrender of any subsisting lease or grant under the stat. 34 Geo. III. c. 75. to be defrayed by the grantee. (*e*)

By the stat. 48 Geo. III. c. 73. s. 20. it is enacted, that where any new building shall be erected, or agreed to be erected on the ground belonging to the crown within the ordering and survey of the chancellor and council of the duchy of Lancaster, or of the surveyor-general of the crown, or held under any lease from the crown, for the enlargement of, and to be united to, and occupied with any house or other building, held under any other lease

(*d*) Stat. 48 Geo. III. c. 73. s. 3.

(*e*) Stat. 48 Geo. III. c. 73. s. 8.

from the crown, a new lease may be granted for any term not exceeding ninety-nine years, as well of the ground on which such new building shall be erected, as of any other hereditaments contained in such lease, provided that the greater part of the yearly value of the tenements or hereditaments so to be granted shall consist of the building thereon, or of ground set apart and appropriated for building, or for necessary gardens or other appurtenants.

The lords of the treasury, by s. 21. of the same act, may lease the profits of agistment of forests disafforested, the profits of præ and post fines in Wales, and the county palatine of Chester, of lighthouses or beacons, and of chains for mooring ships, tolls, markets, and fairs, tithes, fisheries, ferries, and other articles of uncertain produce, for such terms not exceeding thirty-one years, and for such fine or fines, and under such rents, reservations, or conditions, as they shall from time to time think reasonable and expedient.

By the 52 Geo. III. c. 161. s. 8. the commissioners of woods and forests, or the surveyor-general of woods and forests, with the consent of the lords of the treasury, may grant leases to persons relinquishing, after notice, purprestures or encroachments on royal forests, of such parts on the skirts and borders thereof, which shall be deemed not fit for the growth of timber, for any term of years not exceeding thirty-one years, as shall be deemed a reasonable compensation for the expense of any improvement on such encroachment, during the occupation of such persons; and by s. 9. of the same act the commissioners of woods and forests, or the surveyor-general, by the authority of the lords of the treasury, may lease similar lands for any term not exceeding thirty-one years, under reasonable rents, conditions, and covenants, according to the form prescribed by schedule D. of the act. Such instrument to be enrolled in the office of the auditor of the land revenue of the crown, and a minute or docket to be entered and preserved in the office of the commissioners of woods and forests, or in the office of the surveyor-general of woods and forests.

By the 40 Geo. III. c. 88. s. 12. his majesty, his heirs and successors, by warrant under his sign manual, may direct the execution of any trusts of lands escheated, to which they would have been liable in the hands of subjects, and to make any grants of

any such lands, either for the purpose of restoring them to the family of the person whose estate they have been, or for rewarding the discovery of such escheat, as to his majesty, his heirs and successors, shall seem fit; and this power is declared to extend to the duchy of Lancaster by the stat. 47 Geo. III. sess. 2. c. 24. These two acts have been further explained by the stat. 59 Geo. III. c. 94. by which it is enacted, that in all cases in which his majesty, his heirs and successors, hath or shall in right of his crown, or of his duchy of Lancaster, become entitled to lands either by escheat or by reason of any forfeiture, or by reason that the same has been purchased by or for the use of any alien, his majesty, his heirs and successors, may under his or their sign manual, or under the seal of the duchy or county palatine of Lancaster, direct the execution of such trusts as aforesaid, to trustees or otherwise, for the execution of the same, or for the other purposes before mentioned, or to trustees to sell; and by the second section purchasers are declared not answerable for the application of the purchase money.

By the stat. 33 Geo. III. c. 78. his present majesty, when prince of Wales, was empowered to make leases of his possessions, parcel of the duchy of Cornwall, or annexed to the same, for three lives or fewer, or for thirty-one years, or for some term of years, determinable on one, two or three lives, or for any term not exceeding ninety-nine years, for the purpose of building and improving wastes, upon improved annual ground rents, without fine: but this seems to have been a private act, which is now abrogated by the demise of the crown, and the lands of the duchy must be let to farm like any other lands of the crown. But by 50 Geo. III. c. 6., and 52 Geo. III. c. 123. special power was given to the prince of Wales, as duke of Cornwall, to make building leases according to the provisions of those acts, of certain lands in Lambeth, called Prince's Meadows, parcel of the duchy, and by 52 Geo. III. c. 123. s. 11. it was provided, that if the dukedom should be in abeyance, or the duke of Cornwall should be a minor, the powers given by the stat. 50 Geo. III. c. 6. or 52 Geo. III. c. 123. should be exercised by the king or queen for the time being.

By the stat. 1 Hen. IV. c. 6. the application for patents must be by petition, stating the value of the thing demanded, and also of what the petitioners or their progenitors have had of the king's

gift before. By the 18 Hen. VI. c. 1. of every warrant sent by the king to the chancellor the day of the delivery of the same shall be entered of record in chancery, and the chancellor shall cause patents to be made bearing date the day of the said delivery, and not before; and patents made to the contrary are void, (f)

By the stat. 6 Hen. VIII. c. 15. if any person make suit to the king for any lands or other things granted to any person during pleasure, the first patentee being in life, he shall express in his petition or patent the tenor of the former patent, and that the king had then determined his pleasure against the first patentee, or else the second patent shall be void. (g) And by the stat. 27 Hen. VIII. c. 11. every grant made in writing by the king, signed with his sign manual, to be passed under the great seals of England, Ireland, the duchy of Lancaster, or any of his counties palatine, or principality of Wales, or by process out of the exchequer, and all grants and writings which any officers shall make in the king's name, shall, before the same be passed under any of the king's seals, or process made of the same, be brought to the king's principal secretary, or one of the clerks of the signet, to be passed; and by section 2, the clerk of the signet to whom such writings are delivered shall, within eight days, unless he have knowledge of the king's pleasure to the contrary, make letters of warrant, signed with his seal, and sealed with the king's signet to the lord privy seal; and one of the clerks of the privy seal, upon examination by the lord privy seal of the warrant, shall in like manner, within eight days, make other letters of warranty, subscribed with the name of the clerk of the privy seal, to the lord chancellor of England or other proper officer, for the writing and sealing the letters patent or closed. But by section 5, this act is declared not to be prejudicial to the lord treasurer, concerning such warrants as he by virtue of his office may direct immediately to the lord chancellor or other. Nor by section 12. is this act prejudicial to any person who shall have the grant or lease of any farm, the yearly rent of which amounts to not above 6*l.* 13*s.* 4*d.*

The stat. 12 Cha. II. c. 36. s. 1., enabling the master of the Rolls for the time being to make leases to bind his successors according to the provisions of that act, has been repealed by the

(f) Stat. 37 Hen. VI. Irish.

(g) No. Irish Statute to this effect.

stat. 17 Geo. III. c. 59.: but, by the tenth section of the last mentioned act, the master of the rolls for the time being may, after the determination of certain leases therein mentioned, grant leases of the rolls houses, (the chapel, mansion-house, court-yard, stables, and appurtenances excepted) for any number of years in possession not exceeding thirty-one years at the highest rent without fine. (*h*)

When estates are conveyed to uses in strict settlement, or an estate is devised to several persons for life, with remainder over after the same manner as estates are limited in strict settlement, it is usual to annex powers of leasing to the limitations to the several tenants for life. But since such powers derive their efficacy not out of the estate of the person executing the power, but out of the estate of the settlor, they may be either appendant or in gross: that is, either to take effect out of the interest of the person possessing the power, or to take effect only out of the remainder after his death; nor is it necessary that they should be annexed to any estate in the land, for they may be given to a stranger, in which case they are said to be collateral. (*i*) Powers of leasing are usually annexed to the estate for life, because the uncertainty of the duration of the estate of the lessor would be otherwise injurious to the good and husbandlike management of the property. In larger estates the same necessity does not exist: at the same time a power of this kind, if annexed to the estate of tenant in tail, would not be without its advantage; for by such a power a tenant in tail without fine or recovery might make leases to bind the remainder-man or reversioner, whereas by the stat. 32 Hen. VIII. c. 28. he can only bind the issue in tail. (*j*)

The execution of such powers, if created by conveyances to uses, operate as appointments by force of the statute of uses. When the power has been created by will, the better opinion seems to be that they will operate as a testamentary disposition of the property by force of the statute of wills, even where the devise is to uses. The point, however, is not material, as it is now settled that, an immediate devise to uses without a seisin to serve them

(*h*) See Stat. 20 Geo. III. c. 33. and *v. Marriott*, 3 Vin. Abr. 429.
stat. 1 Geo. IV. c. 107.

(*j*) *Bale v. Coleman*, 1 P. Wms. 144.

(*i*) See Sugd. Fow. 47. 3d edit. Foot

is good : and that where an estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee as appears to suit best with the intention of the testator. In either case the power may be well created by will. (*k*)

Powers of this kind are frequently created by private or other acts of Parliament, where it has been found necessary to settle estates in the form of a legislative enactment. In these cases the leases made under them do not operate as appointments to uses : but the powers given by these acts resemble more properly the authority given by the enabling stat. 32 Hen. VIII. c. 28.

Where such powers are created by deed, it is not sufficient that the instrument creating them should derive its effect from the statute of uses : but it should likewise operate by transmutation of possession. (*l*) Such powers therefore cannot be created by bargain and sale, or a covenant to stand seised to uses ; for if it be supposed that a bargain and sale by indenture is made for the life of the bargainee with a power to make leases, this instrument will not in effect transfer the power, because there is only a use raised for the bargainee by virtue of the consideration, to which the statute carries the possession ; but the residue of the estate remains in the bargainor, and then the persons who are to be the lessees being uncertain at the time the bargain and sale is perfected, no consideration can arise from them to the bargainor ; and consequently no use can either at that time or afterwards be drawn out of him, except the use for life to the bargainee. In the same manner, if one covenant (*m*) to stand seised to the use of himself for life, with a power to make leases, such a power is void, so that by virtue of it he cannot make leases to his own sons and daughters, or to any of his blood, much less to strangers ; because upon such general consideration no use can arise, and no averment in case of relationship by blood of a particular consideration can help the power ; because the intent appears to have been general with regard to the person to take such leases, and consequently as to the consideration on which they were to be made. Moreover, since the lease is to arise and take effect out of the estate of the covenantor, there must be a consideration at the time of perfecting the covenant : but in this case neither the persons nor the

(*k*) Butler's note, Co. Litt. 271. b.

Baynes v. Belson, T. Raym. 247.
Gouldsb. 173.

(*l*) Poph. 81.

(*m*) Mildmay's case, 1 Rep. 176. b.

consideration can be ascertained at that time. Upon a feoffment, fine, recovery, or other instrument operating by transmutation of possession, no consideration is necessary to raise the uses; and therefore, by virtue of the power which was created at the same time as the conveyance itself, the lease may be made at any time as the limitation of a use: and after it is executed it will take effect in the same way as if the estate had been limited by the original conveyance. (n)

A power of this kind can be exercised by a feme covert, even without the concurrence of her husband: (o) but an infant can only execute a power where he is a bare instrument, not where he has an interest, or it is to be exercised over real estate; (p) therefore he cannot convey under a power appendant, or in gross, without a special act of Parliament. (q)

The power being a personal authority cannot be delegated. (r) But the cases do not establish the position that the execution by power of attorney after the deed is prepared, where the only act of delegation is formal, is not a good execution, if no particular mode of execution is required. (s) An express power of delegation, however, may authorize such an execution; or the power itself may be made transmissible if in the first instance it is limited to the grantee and his assigns, which will include assigns in law, as well as by the act of the party. (t) Where, (u) however, by a settlement a father was tenant for life, remainder to his son for life, with a leasing power to each when in possession, although the son obtained an assignment of his father's life interest, it was held that he could not exercise either his father's power or his own, till he came into possession in his own right as tenant for life in remainder.

By the 33 Hen. VIII. c. 20. the benefit of all rights, entries, and conditions belonging to persons attainted were expressly given to the crown. The distinctions established upon this legislative

(n) Bayley v. Warburton, Com. 497.

Poph. 81. Co. Litt. 271. b. n.

(o) Harris v. Graham, cited Com. 497. Herle v. Greenbank, 3 Atk. 712. Godolphin v. Godolphin, 1 Vez. 81. See the Duke of Bucks. v. Antrim, 1 Ch. Ca. 18. 3 Salk. 276. Eq. Ca. Abr. 343. 3 Salk. 276. and Anon. Godb. 327. Bac. Abr. Lease I. 11.

(p) 3 Atk. 710.

(q) Butler's Co. Litt. 271. b. n. 8.

(r) Lady Gresham's case, cited 9 Rep. 76. a.

(s) See Sugd. Pow. 176. 3d edit.

(t) How v. Whitfield, Tho. Jon. 110. Paliser v. Ord, Bunb. 166.

(u) Cox v. Day, 13 East, 118.

provision appear to be, that where the power is inseparably annexed to the person or mind of the donee, it will not be forfeited to the crown by his attainder : but where the thing to be done is a mere ministerial or formal act, not inseparably annexed to the person of the donee, but which may be performed by one person as well as another, the power will go to the crown. Thus in *Dacre's case*, (y) where a grant was revocable on the mere tender of five shillings, it was resolved that such a condition was given to the king. But if the power is required to be executed under the proper hand of the donee, or any other mode is pointed out to the performance of which the mind or hand of the donee himself is required, the power does not pass to the crown by the attainder. (z) Where the power is so given to the crown, the ability to perform it is also given as incident to it. The king may commission another by letters patent to perform the act; and upon the performance of it the old uses determine without office found. (a) But such a power must of course be executed during the life of the original donee.

By the late act for the relief of insolvent debtors in England, (b) it is provided, that where persons claiming the benefit of the act are entitled to life estates, with powers of granting leases and taking fines, such powers may be exercised by the assignee of the insolvent for the benefit of creditors, so far as the insolvent could by law vest such power in any person to whom he might lawfully have conveyed his property. Where, therefore, such a power was not transmissible before the statute, it cannot now be exercised by the assignee of the insolvent; for the statute seems to point only at such powers as in the first instance were given to the insolvent and his assigns, and was merely intended to obviate any doubt which might arise, whether the assignee under the act was such an assignee as was intended by the power. With respect to bankrupts there is no statutable enactment similar to the preceding, nor any statute which enables assignees of bankrupts to exercise their powers. They remain therefore in the bankrupt, who cannot be compelled to exercise them : but on the other hand

(y) 17 Eliz. cited 4 Leon. 169.

(a) *Englefield's case*, Moor. 303. (the(z) *Duke of Norfolk's case*, cited 7

best report) and other books.

Rep. 15. a. *Smith v. Wheeler*, 1 Ventr. 128, and other books. See Sugd. Pow. 180. 3d edit.

(b) Stat. 1 Geo. IV. c. 119. s. 12. Irish Stat. 1 and 2 Geo. IV. c. 59. s. 16.

he may be restrained from exercising them to the prejudice of his creditors.

By the third section of the stat. 43 Geo. III. c. 75. the powers of lunatics having a particular estate in land may be executed by their committees under the direction of the lord chancellor of Great Britain and Ireland respectively.

Powers appendant are liable to be destroyed or suspended by the release, feoffment, fine, or recovery of the donee of the power, as also by any of the conveyances which operate by transmutation of possession. (c) Any assurance therefore which carries the whole estate of the grantor may destroy it; and, by parity of reasoning, any such assurance as carries a part of the estate will suspend the exercise of such power during such partial alienation. (d) Where, however, tenant for life with such a power conveyed his life-estate to trustees to pay an annuity during his life, Lord Mansfield thought that the conveyance being only intended to let in a particular charge, did not extinguish the power. (e) The appointment of a receiver under the court of chancery does not seem to have the effect of an absolute suspension: for where after a bill for a foreclosure and a receiver appointed, the tenant for life made leases in pursuance of his power, although the premises were set pending the suit, in the usual way on the motion of a judgment creditor, yet it was without prejudice to the rights of the tenants against the mortgagor. (f) The word "suspension," when applied to powers appendant, seems indeed to have a limited meaning only. It is very right that the grantor after granting a lease should not have the power to defeat his own grant; for instance, by a power of revocation: but with respect to the rest of his estate, supposing him not in the first instance to have disposed of the whole for any valuable consideration, there seems to be no reason why he should be supposed incapable of exercising a special as well as a general power of disposition. In the case of leasing powers there is less difficulty than in any other: for after having granted one lease in possession in pursuance to his power, or in any other way, a

(c) *Cook v. Bromhill*, Noy. 66.

777. *Foster v. Graham*, 2 Str. 962.

(d) Co. Litt. 342. Butler's note, ss. 1.

Gilb. Uses, 5.

4. Dougl. 293.

(f) *Lord Mansfield v. Hamilton*, 2

(e) *Ren d. Hall v. Bulkeley*, Dougl.

Scho. and Lefr. 28.

202. *Saville v. Blacket*, 1 P. Wms.

second lease without the aid of an estoppel would be perfectly nugatory; neither can any special power give him a right to commit a flagrant injustice against third persons. But, subject to such grants, there is no reason why powers should not be exercised *in presenti* after partial alienations of the estate of the grantor. It was however by this kind of reasoning that Lord Mansfield seems to have been misled in the case of *Ren v. Bulkeley* above mentioned. That opinion of Lord Mansfield has not been generally approved; and it has been expressly held by King, lord chancellor, that a mortgage of the whole interest of tenant for life would extinguish the power. As a legal question it is conceived that the point would (f) clearly be so decided. (g) Whether it is a case in which a court of equity would give relief is a point which does not seem to have been much considered. It would certainly be agreeable to justice to consider the mortgage as a mere security, and only an extinction of the power *pro tanto*.

If there be tenant for life with remainder over, under a settlement, in which there is a power to be exercised with the consent of tenant for life, Mr. Sugden seems to be of opinion, that a mere conveyance not operating by wrong of the estate of tenant for life to trustees, and trust for such tenant for life could not possibly disturb the power of consent, because it would in no manner affect the interest to be defeated by the exercise of the power; if the tenant for life sold the estate to a stranger, and an intention should be collected that he was to retain the estate discharged from the power, that would affect the conscience of the trustee or other person exercising the power, and be a bar to such exercise, although with the consent required by the settlement. (h)

Powers in gross are not so easily destroyed; for although by apt words in a release, or by a fine or feoffment which carry all things relating to the land, they may be extinguished; yet an assignment of all the estate of tenant for life, or any other alteration of his estate, will not affect a power in gross; because such an alteration is not inconsistent with his power, which cannot take effect out of his life estate. Moreover, if the tenant for life is disseised, or in any other way his estate is turned to a right, yet this right is

(f) *Vincent v. Ennys*, 3 Vin. Abr. 422.

Lords, is said to involve this point. Sugd. Pow. 57. 3d edit.

(g) *Long v. Rankin*, which now stands for judgment in the House of

(h) Sugd. Pow. 58. 3d edit.

sufficient to support the power in gross, which is not suspended thereby; therefore he may exercise it when out of possession: and if he re-enters, or the remainderman enters after his death, this will reduce all the estates and interests, and amongst them the lease made by virtue of the power. (i)

Collateral powers can by no means be destroyed, suspended, or aliened, by those to whom they are limited. (k)

A present power, not simply collateral, may be extinguished by release to any one who has an estate of freehold in the land in possession, reversion, or remainder; and thereby the estates which were before chargeable are by such release made absolute. (l) Where a power is future, and to arise by a contingent event, it may be annulled by the defeasance of the persons who were parties to its creation. (m) But it does not appear whether in any case such a power could be released by the donee of the power.

If the tenant for life levies a fine, executes a feoffment, or suffers a recovery, all his interest and power of whatever kind is forfeited and extinguished, and he gains a new estate by wrong. (n) It is not material in that case whether the power is present or future. When the fine is levied to the tenant of the land, it will operate by extinguishment and release. (o) But if the fine or feoffment only relate to part of the land, the power remains for the residue. (p) But the acceptance of a feoffment by tenant for life will not destroy a power in gross; for the power never was in the feoffor, nor reserved to him; and by the entry of the remainderman the estate created by the power will be reduced. (q) There are cases likewise in which a feoffment or fine will be deemed not an extinction of the power, but a further assurance of a previous execution of it, or at least merely void. Thus, where a power in gross given to a tenant for life was well executed by deed, and he afterwards levied a fine in pursuance of a covenant in the deed, the fine was considered inoperative, as the power was executed antecedently to the fine. (r)

(i) *Edwards v. Slater*, Hardr. 410.

(k) *Year Book*, 15 Hen. VII. fol. 11.

b. literally translated in *Sugd. Pow.* Appendix, I. *Sugd. Pow.* 49. 3d edit.

(l) *Albany's case*, 1 Rep. 110. b. Co. Litt. 285. b.

(m) *Albany's case*, 1 Rep. 111.

(n) *Edwards v. Slater*, *supra*. King

v. Melling, 1 Ventr. 225. *Savile v. Blacket*, 1 P. Wms. 777.

(o) *Bird v. Christopher*, Styl. 380.

(p) *Digge's case*, 1 Rep. 173. a.

(q) *Hard.* 417.

(r) *Thomlinson v. Dighton*, 10 Mod. 71.

It frequently happens, observes Mr. Sugden, that a tenant for life of an estate in strict settlement with the ultimate remainders to himself in fee, with powers of leasing, &c. acquires the fee by the failure of the intermediate limitations; and it may be questioned whether all these powers continue after the accession of the fee. Perhaps the better opinion is, that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to endure beyond the continuance of the limitations which they were intended to overreach. (s)

In general, the intention of the party creating the power is the primary guide of interpretation: but, since the restrictive part of the power is for the benefit of the remainderman, the power as to him must be followed with a reasonable strictness. A demise, therefore, of a greater interest or a less beneficial reservation than the power directs, will vitiate the whole appointment as far as he is concerned, so that no acquiescence of the remainderman, or those claiming under him, can make it good. (t) It has been further determined that if it appears that the lease is intended to operate only as an appointment under the power, and it is not a good execution of it, the lease will be void *ab initio*, and cannot even operate as a voidable demise at the common law to the extent of the interest of the person executing the power. On the other hand, if a man has both a power and an interest, and he creates an estate which will expire before its natural termination, if referred to his interest, but may be good by reference to his power, it will be intended that it was made in execution of his power. (u)

The qualifications and restrictions usually inserted in such powers bear a close relation to the mode prescribed for making leases under the stat. 32 Hen. VIII. Like all other powers of appointment, they must be executed by an instrument in writing, with the usual ceremonies of sealing, signing, and attestations of witnesses required by the instrument creating the power. The execution of the power being the limitation of the seisin transferred by another conveyance cannot be considered as an independent conveyance: but the use need not be limited specifically in pursuance of the power; for a common lease, if conformable to

(s) Sugd. Powers, 91. 3d edit.

(t) *Smith v. Doe d. Earl of Jersey*,
Dom. Proc. 2 Brod. and Bing. 473.

(u) *Campbell v. Leach*, Amb. 740.

Rogers' case, cited by Lord Hale, 1
Ventr. 332. *The Earl of Leicester's*
case, 1 Ventr. 278.

the power, will still operate as an execution, though an informal one of the power. (x) So, although it is true generally, that the execution of such a power has relation to the conveyance creating the power, yet the interest of the lessee will only take effect from the time of the demise, although the lease takes effect as the limitation of an use under the original instrument. In the same way a power in gross, if exercised by will, is not completely executed, till the death of the devisor; because till then the will is ambulatory, and may be revoked by the testator. (y)

It is a general and a plain rule that every circumstance required to the execution of a power must be strictly attended to: but, where the appointment is to a charity, any writing, however informal, as an execution of a power, is good as an appointment within the statute of charitable uses: (z) for this statute supplies all defects of assurance which the donor was capable of making. (a) Mr. Sugden has observed, that the stat. 9 Geo. II. c. 46. has required certain formalities in the making of gifts to charitable uses: but this act he conceives cannot be considered as repealing the statute of charitable uses. And, therefore, that if in an appointment the solemnities imposed by the stat. 9 Geo. II. are attended to, the gift will operate as an appointment under the statute of charitable uses, although the instrument is not executed in the manner required by the power. But as the act of the 9th Geo. II. applies as well to appointments under powers as to original conveyances, if the donee wish to appoint to charitable uses, although under the power he might appoint by a simple note in writing unattested, yet he must conform to the directions of the act. (b)

There are few cases, however, in which the courts require any thing beyond the letter of the power: therefore, where a writing under hand and seal is required, it need not be delivered, although a writing under hand and seal seems to intend a deed which requires delivery. (c) So where the deed is required to be duly attested, an attestation by one witness is sufficient. (d) The mode, however, is sometimes implied, as where it is required to

(x) *Sergison v. Sealy*, 9 Mod. 391. Vern. 755. *The Atty. Gen. v. Rye*, 2

(y) *The Duke of Marlborough v. Lord Godolphin*, 2 Vez. 61. Vern. 453.

(z) *Stat. 48 Eliz. c. 4.*

(a) *Stat. 48 Eliz. c. 4.* *Pigot v. Pearce*, Com. 350.

(b) *Sugd. Pow.* 213. 3d edit.

(c) *Carter v. Carter*, Mosel. 369.

(d) *Poulson v. Wellington*, 2 P.

(e) *The Atty. Gen. v. Burdet*, 2 Wms. 533.

be executed by deed or will. There the instrument must be executed in the manner prescribed by the common and statute law for the execution of deeds and wills. Where the power embraces both real and personal estate, and is to be executed by will, it will be a good appointment as to personalty, although not duly executed, to pass real estate. (c)

It would be foreign to the purpose of the present treatise to enter very minutely into the discussion of the subject of the execution of powers. It should, however, be remarked, that where powers have been required to be executed "by writing under the hand and seal of the donee, and attested by two or more witnesses," much difficulty has arisen in consequence of the usual form of attestation to a deed being used, which is "sealed and delivered by the party in the presence of us," without inserting the word "signed" in those deeds which enure as appointments under such powers as have been stated. An act was passed in 1814 (f) to remedy this difficulty: which has not been effectual, because its operation was merely retrospective. Mr. Sugden, therefore, recommends it to every conveyancer to expunge from his common forms of powers any expressions which may require the word "signed" to be inserted in the attestation; and solicitors should in every case make the attestation "signed, sealed and delivered." (g)

Where an instrument executing a power is required to be executed in the presence of two or more witnesses, and nothing is said about their attesting the execution, the power will be duly executed, though the witnesses do not subscribe the attestation indorsed, or some of them do, and others do not. (h) And, by analogy to the decisions on the statute of frauds, it is conceived that in the absence of an express requisition, that the witnesses shall all attest the instrument at the same time, they may attest it at different times. (i) It is here material to observe that, generally speaking, every formality required to the execution of the power must be perfected in the lifetime of the donee of the power, although it be external, or *dehors* the deed. Thus it has been held, that if inrolment is required, it must be done in the life of the donee. (k) Where the consent of any person is required to

(c) *Duff v. Dalzel*, 1 Bro. Ch. Ca. 147.

6 Taunt. 402.

(f) Stat. 54 Geo. III. c. 168. Mr. Preston's act.

(h) *Sayle v. Freeland*, 2 Vent. 350.

(i) *Sugd. Pow.* 239. 3d edit.

(g) See *Doe d. Hotchkiss v. Pierce*,

(k) *Hawkins v. Kemp*, 3 East. 410.

the execution of the power, that, like every other condition, is essential: and if such person die without having assented, the power is gone, although the condition was rendered impossible by the act of God. (l) Where the consent of several persons is required, the death of one of them destroys the power. (m) And if a person's consent is required, he cannot delegate the confidence reposed in him, any more than the donee of the power can delegate the discretion reposed in him. (n) So where an act of Parliament authorized the vicar of C. to grant leases of the glebe lands, with the consent of the patron in writing, the patron being lunatic, the consent of the committee was held not to be equivalent; and on an application by the committees of his person and his estate, for a reference to the master to inquire whether it would be fit that they in his behalf should consent to a lease, the lord chancellor said, that unless the act requiring the consent of the patron in writing authorized the committee to consent for him, he could not sanction a lease with the consent of the committee. (o)

If a power be given to a person to make a lease six months, or any given time before his death, the power may be executed at any time, although it be not six months before his death, but a month, a week, or a day; for the duration of his life cannot be known. (p)

Mr. Sugden has cited a case (q) which he conceives is an authority, that where a power is to be exercised on a contingent event, it may be executed before the happening of the contingency, although the words of the power seemed to make the happening of the contingency a condition precedent. The power ran thus: (it being contained in a marriage settlement) that if the said J. S. (the husband) shall happen to die, and M. (his wife) shall him survive, and there shall be no issue of the marriage living at the death of M., then, and in such case, &c.: but here the condition was of a complex kind; for it was of necessity that she should execute the power after the death of her husband, although there should be

(l) *Danne v. Annas*, Dy. 219. pl. 8.
Mansell v. Mansell, Wilm. 36.

(m) *Atwaters v. Birt*, Cro. Eliz. 856.

(n) *Hawkins v. Kemp*, *supra*. *Mason v. Joseph*, 1 Smith, 466.

(o) *Ex parte Smith*, 2 Swanst. Ch. Ca. 393.

(p) *Harris v. Graham*, 2 Roll. Abr. 247. pl. 6.

(q) *The Countess of Sutherland v. Northmore*, 1 Dick. 56. S. C. 3 Vin. Abr. 427. pl. 8. *nomine Sciator v. Travell*, Sugd. Pow. 271. 3d edit.

issue. The feme however executed the power in the husband's life, where there was no such necessity; and both the Court of King's Bench, and the Court of Chancery, held it to be well executed. (r) In a case before Lord Thurlow, (s) where a power was given to the survivor of two persons, and they executed a joint appointment, he held it bad.

Where a tenant in fee in possession makes a settlement, with powers to lease generally, there the lease made in pursuance of the power must be in possession: but if, at the time of making the settlement, the person making it is only possessed of the reversion, it has been the general doctrine, although considered doubtful by Mr. Sugden, (t) that such a general power will warrant a lease in reversion. (u) But where there was a special power to lease in possession, and not in reversion, a lease for years executed to the tenant then in possession to hold as to the arable land from the 13th Feb. preceding, and as to the rest of the premises, to begin from a future day, was held void, although it was according to the custom of the country, and the lands had been granted in the same way before by the person creating the power. (v) If, however, under a power to demise in possession, and not in reversion, a lease is dated in fact on the 17th Feb. to hold from the 25th March next ensuing the date, this will be good, if it is not executed till after the 25th March following, for it then takes effect as a lease in possession. (x)

Where there is a power to lease both in possession and reversion for lives as well as years, it cannot be strictly executed as to leases for lives in reversion, because a freehold interest created as the appointment of a use cannot be made to commence *in futuro*: but Lord Holt thought that such a power should be intended to authorize a lease of the reversion, in order to give effect to the intention of the parties. (y)

(r) See *Doe d. Calkin v. Thomlinson*, 2 Mauld. & Selw. 165.

(s) *Mac Adam v. Logan*, 3 Bro. Ch. Ca. 310. See *Coxe v. Day*, 13 East. 116.

(t) *Sugd. Pow.* 583. 3d edit.

(u) *Opey v. Thomasina*, 1 Lev. 167. *Lord Coventry v. Lady Coventry*, Com. 312. *Stoddomb v. Hawkins*, Yelv. 222. 2 C. Cro. Jac. 316. but see *T. Raym.* 133. *Lepar v. Wroth*, 2 Leon. 35.

Palm. 468. *The Marquis of Northampton's case*, 3 Leon. 71. *Anon. Dy.* 357.

(v) *Doe d. Allen v. Calvert*, 2 East. 376.

(x) *Doe d. Cox v. Day*, 10 East. 427. See *Bowes v. The East London Waterworks Company*, 3 Madd. Ch. Ca. 375. *Hall v. Casanova*, 4 East. 477.

(y) *Winter v. Lovelady*, Carth. 427. 1 Roll. Rep. 12.

If a person have a power to lease in possession, and he leases without reference to his power before the expiration of a former term, to one of the lessees under the former demise, if the former lease is in fact abandoned, in equity it will be considered as surrendered. (x)

If there be tenant for life, remainder to B. in tail, and the tenant for life having a power to lease in possession and reversion make a lease for years, to commence after the death of B. without issue, B. may bar this lease by a recovery, because it is in continuance of his estate. (y)

A power to grant a lease may, by the particular wording of it, authorize a lease in reversion, although not so expressly stated, and although the estate is not in lease at the time of the creation of the power. Thus, where (b) the power was to lease for any number of years not exceeding ninety-nine from the time of making the demise, it was adjudged that the latter words did not refer to the commencement of the lease, but only restrained the making of a lease for more than ninety-nine years from the making; and therefore, that if it do not exceed the limit assigned, it might be made to commence *in futuro*.

Although a power enable a man to make leases in reversion as well as in possession, yet he cannot make a lease in possession and another lease in reversion of the same land: but his power to make leases in reversion shall be confined to such land as was not then in possession. (c)

The general mode of constituting a leasing power is to express that the party shall be enabled to make leases of the intended duration in possession, but not in reversion, or by way of future interest, in which case it is clear that any lease to commence after the day on which the lease is made is bad. But, considering the general mode of making farming leases to commence on some future day, and the ignorance of the law which often exists in the persons employed to make leases under the owners of great estates, and also the ignorance which may prevail amongst such persons of the fact of a settlement, Sir W. D. Evans conceives it would be better that the power given should be to demise for a term to commence in possession, or *within one year from the time of the making of the lease*.

(x) *Campbell v. Leach*, Amb. 740.

(y) *Harcourt v. Pole*, 1 And. 273.

(b) *Benson v. Hudson*, T. Raym.

(c) *Winter v. Loveday*, 1 Com. 22.

It is an important question whether, under the power to lease in possession, a lease for years may be made to commence immediately during a subsisting lease of the same premises. The question is divisible into two parts. 1. As to cases where the pre-existing lease is either not conformable to the power, or not pursuant to the limitations of the estate, and consequently void as against the parties in remainder; and, 2. As to cases where the preceding lease is valid, as against the estates in remainder, either as being paramount, or as being made in conformity to the power. In the first case the authorities seem to be clear in favour of the validity of the second lease. (d) In the latter case, it is stated by Lord Mansfield in the book just cited, that the concurrent lease is good: but the point was not material to the decision of the case before him. So in a recent case (e) it was stated by Lord Ellenborough, C. J. that a chattel lease might be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the existing lease; but that so long as there is a freehold lease *in esse*, a second freehold lease can not be granted. The right of granting a second chattel lease, he added, was settled in *Read v. Nash*, (f) and is recognized as law in *Goodtitle v. Funucan*. (g) But this observation of Lord Ellenborough was not necessary to the decision of the principal point in the case, *viz.* whether a power to lease for lives warranted a lease for ninety-nine years, determinable upon lives: but it was considered as furnishing a ground of argument in support of such demises, and as shewing that the lease in question might be more prejudicial to the remainder-man than one made in conformity to the power. The ground upon which such leases have been supposed to be good is, that it has been held upon the restraining statutes 1 Eliz. and 18 Eliz. that concurrent leases for years, made by a bishop, with the assent of the dean and chapter, and concurrent leases by ecclesiastical corporations, except as restrained by these statutes, are valid. But the propriety of these decisions has been much questioned; and they are rather considered as supported by authority, than as well founded in point of principle. The statutes being a restraint on the common law right previously existing do not furnish a ground for deciding by analogy to the case of en-

(d) *Goodtitle d. Charges v. Funucan*, East. 155.

Dougl. 565.

(f) 1 Leon. 148.

(e) *Doe d. Bruns v. Prideaux*, 10

(g) *Supra*.

abling powers under private settlements. The observation in *Read v. Nash*, (h) in support of such concurrent leases, as founded upon analogy to the statutes of Elizabeth, is merely the argument of counsel, and nothing appears as to the decision of the Court. There is not any authority amounting to an actual decision in favour of such leases. (i)

Under a power to trustees to let premises for a term not exceeding twenty-one years, and determinable as a former term for ninety-nine years was determinable, as they should think proper. It was held that they were authorized only to lease in possession, and not *in futuro*. (j)

In *Roe v. Prideaux*, (k) it was held that a lease for ninety-nine years, if three lives so long live, was not warranted by a power to lease for three lives, or twenty-one years. But in such cases relief may be had in equity, although it has not been determined whether such a lease should be supported for three lives, or only for twenty-one years. There is however no instance of relief in equity, where a lease has been made to commence *in futuro*, under a power to lease in possession; and it has been said, that it cannot be done.

In *Lsherwood v. Oldknow*, (l) it was objected that a power to demise for twenty-one years did not warrant a demise for a shorter term: but the objection was over-ruled, on the ground that any person may renounce a benefit in the whole or in part.

A power to lease for ninety-nine years, determinable on lives, will not enable the donee to make a lease for the life of A., to commence on the expiration of a subsisting lease, determinable on the lives of B. and C. (m)

In the construction of powers to make leases for three lives, three lives jointly coexisting must be understood to be the measure of the estate; and the case is the same, whether a lease be made to three for their joint lives, or to one for the joint lives of three; for three lives are in either case the measure of the estate. (n)

In *Whitlock's case*, (o) A. seized of a reversion in fee ex-

(h) 1 Leon. 148.

(i) 3 M. and S. 382.

(j) MS. observations by Sir W. D. Evans, and see Sugd. Pow. 595. 3d edit.

(m) Baynes v. Belson, T. Raym. 247.

(k) *Shaw v. Summers*, 3 B. Moore 196.

(n) *Alsop v. Pine*, 3 Keb. 44. See *Wyndham v. Halcombe*, 7 T. R. 713.

(l) 10 East, 158.

(o) 8 Rep. 69.

pectant on an estate for life on the marriage of his son, covenanted to levy a fine to the use of himself for life, remainder to his son for life, with remainder over, and a power was to be reserved to himself to make leases in possession, or reversion for lives or years, provided that such lease or leases should not exceed three lives, or twenty-one years; and afterwards he demised for ninety-nine years, determinable on two lives. This was held good under the power, according to the principle already mentioned, namely, because the first part of the power enabled him to lease indefinitely, and the restraint which came after was only for the purpose of preventing his leases exceeding twenty-one years, or three lives, which these clearly could not: but the Court agreed, that if there is a power generally to lease for three lives, a lease for ninety-nine years, determinable on three lives, is not in pursuance of the power. (*l*) Where, however, A. made a settlement, and limited the estate to himself for life, remainder to his son for life, with remainder over, with power to his son when in possession, to assign or limit the land to any woman whom he should marry, or to the use of or in trust for her in lieu of jointure, and the son on his marriage by deed reciting the power, demised the estate to trustees for ninety-nine years, if his wife should so long live, in equity this lease was held warranted by the power. (*m*)

In a case (*n*) where tenant for life of lands, situated in Ireland, had full power to make leases for any term not exceeding thirty-one years, or three lives in possession, and made a lease for three lives, or thirty-one years, which ever should last longest; it was held, on argument before the barons in Ireland, to be a good execution of the power; and the judgment, after being affirmed by the Lord Chancellor and Lord Annaly, L. C. J. of K. B. in Ireland, was finally confirmed in parliament:

In *Winter v. Loveday*, (*o*) a question arose whether the power authorised a lease for a term absolute or dependent upon lives. The power was to lease "if in possession for one, two, or three lives, or for the term of thirty years, or for any other number or

(*l*) 2 Roll. Abr. 260. *Lutwich v. Pigott*, 3 Mod. 268. *Rattle v. Pop- ham*, Amb. 335. *Alexander v. Alex- ander*, 2 Vez. 645. *Doe d. Collins v. Weller*, 7 T. B. 478. *Church- man v. Hervey*, Amb. 335. *Roe d.*

Brune v. Prideaux, 10 East. 158.

(*m*) *Popham v. Rattle*, Amb. 335. *Churchman v. Hervey*, *ibid.*

(*n*) *Commons v. Marshall*, 7 Bro. P. C. 111. See *Cowp.* 268.

(*o*) 1 Com. 37. and other books.

term of years, determinable upon one, two, or three lives, or in reversion for one or two lives, or for the term of thirty years, or for any other number or term of years, determinable on one or two lives. Mr. Justice Rokeby held, that a term could only be granted determinable upon lives: but Lord C. J. Holt, and Newton and Eyre J.J., held that a lease for thirty years absolutely, was good within the proviso: which construction, though not free from doubt, will appear upon consideration to be the reasonable sense of the words of the power. (*p*)

In the case of *Lutwich v. Pigott*, (*q*) the power was to demise for three lives or twenty-one years or under, or for any term of years, upon one, two, or three lives, or as tenant in tail in possession might do. It was insisted that a lease for twenty-one years only could be granted, determinable upon lives: but the court with great reason supported a lease granted under the power for ninety-nine years, determinable on three lives. By the Irish stat. 17 and 18 Geo. III. c. 49. s. 11. all persons having power under settlements to make leases for lives may let for years determinable on lives.

A general power to a tenant for life, to grant a term or an estate, without specifying the duration of it, will enable him to grant a term beyond his own life, although it defeat the remainder over; for otherwise the power would be merely idle and void, for every tenant for life may alien during his own life. (*r*) But where before the stat. 12 Ch. II. (permitting the appointment of testamentary guardians,) one seised in fee devised his land to his son in tail, with remainder over, and made A. overseer of his will, and willed that he should have the education of his son till 21; and receive, set, and let for his said son the said lands so given, and thereof account to his said son; it was held that this gave him no power to make leases but at will. A lease therefore made by him for seven years in his own name was held void. (*s*)

Since powers for the most part derive their effect from the statute of uses, the only quality in the hereditaments which are the subject of demise, necessary to render them demisable under powers is, that, they should be capable of being appointed to uses, and that those uses should be capable of being executed by

(*p*) See Sugd. Pow. 457.

pl. 10.

(*q*) 3 Mod. 268.

(*s*) *Pigott v. Garnish*, Cro. Eliz.

(*r*) *Hele v. Green*, 2 Roll. Abr. 261. 678, 734.

the stat. 27 Hen. VIII. so as to convey into possession a common law interest. It is obvious, therefore, that no power of appointment under the statute of uses can affect copyhold lands, because the possession of a copyhold estate cannot be transferred without the intervention of the lord: so it is equally impossible that the execution of a power limited by will can be good, if the lease made be contrary to the custom, and without licence. A power, however, may be given to a tenant for life to demise copyholds, parcel of the manor: but then such a lease will destroy the copyhold tenure; for a copyhold once leased is enfranchised for ever. (t) But where a tenant for life of a manor had a power to make certain leases of the lands of the manor, with the exception of the ancient demesne lands, it was held that a lease of copyhold lands was not warranted by the power; because copyhold lands are supposed to have been time out of mind parcel of the manor, and therefore part of the demesne. (u)

So where by act of Parliament a tenant in tail had a power to make leases for lives, for years, or at will, after the custom of the manor yielding the true and ancient rent, and he made a lease of freehold and copyhold lands together, reserving such a rent, this was held not warranted by the act as to copyhold lands, because the act spoke of leases at will according to the custom of the manor, and consequently imported that the copyhold lands should not be demised otherwise than by copy: besides which the rent reserved was a customary rent, and not a rent upon a lease at common law. (x) This case, although it depended on a private act of Parliament, yet embraces some of the doctrine applicable to powers, and has been frequently referred to in the course of the discussions respecting them. The tenements in question were ancient copyholds demisable for lives. By a private act of Parliament the manor was limited in tail, with a clause that the donees should do nothing to the disherison of their heirs; except by the jointure of a wife for her life, or a limitation to a husband for life, or for the term of the life of any other person, or for years, or at will, according to the custom of the manor, rendering the true and ancient rent of the said lands and tenements so demised. The manor consisted of divers free rents amounting to 7*l.*, of fifteen copyhold tenements holden

(t) Co. Copyh. s. 62.

(x) Lord Mountjoy's case, 5 Rep.

(u) Winter v. Loveday, Carth. 427. 3. b.

for lives, the customary rents of which were 3*l.*, and of demesnes usually demised by indenture, for rents amounting to 8*l.*; and there was an acre of waste, parcel of the manor, in which there were divers timber trees, and common for the tenements, which acre and common were of the annual value of 12*d.* Upon the death of each copyholder a heriot was due to the lord by custom. There was a court baron incident to the manor with perquisites of court, and a court leet appendant. The free rents, copyhold rents, heriots and perquisites of court, had never been demised for life, years, or otherwise. The tenant in tail by fine *sur grant and render* of a moiety of the manors with the appurtenances, and a great number of acres comprising the demesnes, granted and rendered the said manor with the appurtenances for 300 years, rendering rent amounting to the free rents, the copyhold rents, the farm rents, and 18*d.* more, and 12*d.* for the acre of waste. The term of 300 years was ruled to be void. The second and third resolutions in the case were as follows: 2. That in respect of the said acre of waste, which was never demised before, the rent, which was entirely reserved out of the whole, could not be the true and ancient rent;—for how could it be said to be the ancient rent, when it issues out of a thing which was never charged before? 3. By the grant and render of the manor, he to whom the render was made had an interest and term in the land held by copy; and when any of the copyholders died, or the lands became forfeited, he might enter and enjoy the land himself if he would and the rent reserved issued out of the lands held by copy, which lands were never charged with rent before, but always had been demised by copy according to the custom of the manor; and since the demesnes of the said manor had alone been demised for rent, the entire manor could not be within the act. Also the estates which tenant in tail should make under the act were distinguished into estates for lives, for years, or at will, according to the custom of the manor: but by this grant and render the whole is put in hotchpot and tumbled together, whereas the copyholds ought to have been demised by copy according to the custom.

In the case of *Campbell v. Leach*, (y) it was determined that under a power to lease the messuages, lands, tenements, and hereditaments in the deed mentioned (except the capital messuage and warren) at the best rent, opened mines might be leased as they

(y) Ambli. 740.

were in lease at the time of the settlement; and twelve years then to come of the term must be understood to have been settled for the benefit of all claiming under it, and the words were sufficient to carry the mines. No opinion was given as to unopened mines.

In animadverting upon a rule laid down by Lord Holt, (*y*) "that where a man hath power reserved to him of making a lease of two things, and a qualification is annexed to the power which cannot extend to one of these, he may make a lease of that thing without regard to the qualification," Mr. Sugden observes, that it may be a sound rule: but the question in these cases is, whether the qualification does not form part of the sentence, and virtually exclude that subject to which it is admitted it cannot extend. There are, however, cases to which Mr. Sugden conceives the rule ought to be applied: as if in a power to lease estates, including mines opened and unopened, a clear intention appears to embrace all the mines, but a clause is added that no lessee shall be dispunishable for waste; there, to effectuate the general intention of the power, the latter clause should not be deemed applicable to unopened mines; the working of opened mines being deemed no waste, but opening new mines being so considered. (*z*) So if a similar clause should be inserted in a power to grant leases at rack rent and building leases, it should be construed to extend to leases at rack-rent only, because no improvements could be made, unless old buildings could be pulled down, trees felled, &c. which acts are acts of waste. (*a*) Indeed, it even seems that such a clause in a power to grant building leases only, would not restrain the liberty of pulling down old buildings, in order to erect new ones. (*b*)

In general, powers in private conveyances are likewise restricted to letting lands, which have been usually demised. In the case of *Tristram v. Lady Baltinglass*, (*c*) a tenant for life under a settlement made in the 12th James I. had a power to make leases of all or any part of the lands in settlement, which at any time previous to the settlement had been usually demised. He made a lease of several parcels according to the power, reserving the same rents which were reserved at the time of the settlement: but he likewise leased certain lands in settlement called Lofield,

(*y*) 1 *Ld. Raym.* 270.

(*b*) See also the observations which follow.

(*z*) *Campbell v. Leach*, *Amb.* 740.

Co. Litt. 54. b.

(*c*) *Vaugh.* 28. *Foot v. Marriott*, 3 *Vin. Abr.* 429. pl. 9. S. P.

(*a*) *Sugd. Pow.* 580. 3d edit.

which the jury found not to have been leased since the 12th of Elizabeth, when they were let for 21 years, reserving 100*l.* rent. The tenant for life now leased these lands for 21 years, rendering the same rent, and in every other respect in strict conformity with the power. The lease of the former lands was held good, because it was expressly found by the special verdict, that the rents reserved were the same as those reserved at the time of the settlement, which necessarily implied that the lands were in lease at that time; and being ancient lands, they should be presumed to have been usually demised; but it was adjudged that the lease as to Lofield was not warranted by the power. One of the reasons assigned by the court was, that Lofield could not be called land usually demised, because it did not appear to have been leased more than once: (c) but it was admitted that the words "usually demised" might signify a continuance in lease, as land demised for 500 years is land usually demised, though demised but once. Another reason, however, for avoiding the lease of Lofield was, because at the time of the settlement no rent was yielded and paid for it, the words of the power being that the rent then yielded and paid should be reserved, and therefore that these lands could not have been intended to be leased by the power. This last reason for avoiding the lease of Lofield has been strongly objected to: and the objections to it seem worthy of attention; because in another part of the power the words are, that the tenant for life should have power to make leases of all or any of the lands, which at any time previous to the settlement had been usually demised, which seemed to imply that some lands intended to be leased by the power were not then in lease. The clause, therefore, of reserving the rents then yielded and paid must in that case be understood only to extend to such lands as were then in lease. As to the rest if this were the true construction, there would be no restriction in regard to the rent, according to the above mentioned rule of Lord Holt; and, consequently any rent might be reserved, or the reservation might be omitted altogether. One book seems to support expressly this construction. In Comberford's case, (d) a tenant for life had a power to make leases, provided that so much rent or more should be reserved in every lease, as was paid for the same premises within two years next before; and it was resolved that lands might be leased by virtue of this power, which had yielded no

c) 2 Roll. Abr. 262.

(d) Ibid.

rent within the two years next before. The only difference between this and the last case was, that here there was no restriction as to lands usually demised ; but, as far as the reservation of rent was concerned, the cases seem to be parallel.

The same reasoning seems also to be supported by the case of *Walker v. Wakeman*. (e) A settlement was made to the use of tenant for life with remainder over, with a power to the tenant for life to make leases of all or any part of the premises settled, provided that five shillings an acre rent should be reserved on every lease. The tenant for life demised a rectory in pursuance of his power which was included in the settlement, but consisted only of tithes without any glebe ; and a rent was reserved. It was argued that this lease was void, because the construction of the power was to be made on the whole clause ; and the latter words, which appoint the reservation of five shillings an acre rent restrained the general import of the word to lands only : otherwise it might as well be said that where there is a power to make leases so as the ancient rent be reserved, lands which were never before demised may be leased under the power, and that the words ancient rent should only be applied to lands which had been anciently or usually demised. But it was so answered and finally so resolved by the court, that the lease in question was within the power ; and so they said would a lease of lands not usually demised be in the case put ; for the power being general and affirmative, at first to make leases of all or any part, the restraint which comes after shall be extended no further than the words themselves import ; that is, in the one case to so much an acre for that which consists of acres, and to the ancient rent for that which was anciently or usually demised in the other.

The resolution in *Walker v. Wakeman* was principally founded on *Comberford's* case. Hale C. J. however said, that if the matter had been *res integra*, perhaps he might have been of a different opinion. Subsequent cases, although they have not directly denied *Comberford's* case, yet appear to have considered the construction of the restrictive clause too technical. What may be urged on this point has been concisely stated by Mr. Serjeant Lens in his argument in the case of *Pomery v. Partington*. (f) Powers, he observed, of this sort have always been construed

(e) 1 Ventr. 294.

(f) 3 T. R. 668.

strictly, so as to prevent the reversioner from being injured for the sake of a present benefit to the tenant in possession; and taking the whole power together, it amounted to this, that all such parts of the estate as had been before demised might be demised again at the usual rents; but that the rest should not be demised at all. He then proceeded to state the authorities in support of this position: the foundation of the judgment in Lord Mountjoy's case, (*g*) which was the case of a power under a special act of parliament, was, that the intention of the parties might be collected from the words "yielding and paying the true and ancient rent;" and that those words clearly imported that nothing should be demised under the power which had not been before demised. The case of *Bagot v. Oughton* (*h*) had been decided on the same principles. The power there was to lease all or any part of the premises at such rents or more as the same were then let at. The tenant for life leased a capital messuage with demesne land reserving no rent. The court were unanimously of opinion that the lease was void; and referred to the case of *Tristram v. Lady Baltinglass*. According to the report in *Fortescue*, (*i*) the court held the lease void, notwithstanding the case of *Walker v. Wakeman*, and *Comberford's* case. With respect to *Comberford's* case, he observed, that the lands were there conveyed to uses with a power to make leases of the premises or any part of them for three lives, or for years determinable on lives, *ita quod* such rent or more be reserved as was reserved or paid thereon for two years next before. Some of the lands had not been leased before at any rent for two years; yet it was said the party might lease those lands, reserving what rent he pleased; because it was thought, from the generality of the words, that an intention was apparent to extend the power of leasing to those lands. Perhaps part of the case might be cited to shew, that the construction of the power must be governed by the intent of the parties: but if it should be cited to prove that the generality of the words in the first part could not be restrained by the subsequent words, that could not be law; for the act of Parliament in

(*g*) 5 Rep. 5.

(*h*) 8 Mod. 249. Fort. 332. In 8 Mod. 252. this case, which was a case sent by Lord Cowper to the K.B., is said to have been affirmed by Lord Cowper, and afterwards in the House

of Lords: but Mr. Sugden states, that after the most diligent search, he has not been able to meet with it among the printed cases of that period.

(*i*) *Bagot v. Oughton*, *Fortesc. ubi supra*.

Lord Mountjoy's case had equally general words, yet they were held to be restrained by what followed. In *Walker v. Wakeman*, the restriction could not operate upon the rectory, which however had been included in the settlement. And although the same doctrine had been advanced in *Winter v. Loveday*, the point was not before the court.

In *Foot v. Marriott*, (i) the manor of B., with several other manors and estates, were devised by Serjeant Maynard in strict settlement, with a power for the tenant for life of the manor of B. to lease all or any of the tenements thereof for lives, "under the rents now reserved thereof, and the like agreements and covenants as in the leases now in being, and by the present tenants to be performed and kept." And he gave also a power to the agents for the time being to let any of the premises at rack rent for not more than seven years. It was held by Lord Ch. King, assisted by Lord Raymond, Denton, J. and Comyns, B., that the power to lease for lives did not extend to a tenement within the manor of B., which was out upon a lease for lives at the time of Serjeant Maynard's purchase; but the lives had dropped before he made his will, and the premises were in his hand at the time of his death. The cases of *Tristram v. Lady Baltinglass* and *Bagot v. Oughton* were materially relied on in the opinions of the judges, and they said if *Comberford's* case was law, it should not be carried a step farther. The lord chancellor said that the word "tenement" in the will in legal understanding has a general signification; but in common understanding means lands holden by tenants; and this appears to be the meaning of the testator by the subsequent power to lease at rack-rent. The word "tenant," however, is used in some part of the country in common parlance, to denote premises leased for lives, and in contrast with the term "land" which is used to denote lands held for an estate of inheritance.

In the case of *Goodtitle d. Clarges v. Funucan*, (k) the power required the rent then paid for the premises, or more, to be reserved, or proportionably for any part thereof. The question was whether certain manors and a fishery might be demised within the power; the manors never having been let, and the fishery not being in lease at the time of the settlement. Lord

(i) 3 Vin. Abr. 429.

(k) Dougl. 565.

Mansfield, in delivering the judgment of the Court, expressed himself to the following effect:—In the case of *Bagot v. Oughton* the nature of the thing shewed that the power could not be intended to extend to letting the ancient manor-house at all, much less to letting it without reserving any rent. No man could intend to authorize the tenant for life to deprive the representative of the family of the use of the mansion-house: where, however, nothing arises from the nature of the thing to shew the intent, the rule laid down by Lord Holt in *Winter v. Loveday* applies; namely, that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification. So in *Comberford's* case, the reasoning was that the power being to let all, it would go in destruction of the power to restrain the tenant for life from letting part, because it had not been let before. *Walker v. Wakeman* is another case equally strong. Thus stand the authorities: now to apply them to the present case. The power is express to demise the manors and fisheries; they are mentioned in the settlement, and the power goes to the whole. They pay as great a yearly rent as at the time of the settlements; for they paid nothing then. The words therefore are complied with, and the objection can only stand upon the intention: but we think no such intent appears. The manors are of no value, no object of yearly income. The fishery only worth fifteen shillings a year. They are convenient to the lessee living on the land; and of no use to the remainderman, to whom the right of fishing and shooting is reserved. For my own part, concluded Lord Mansfield, I think the intent was to give leave to demise all, reserving as much rent for the whole as had been paid before; and in fact 30% more has been reserved. It has been said, (*l*) however, that the Court in this case relied on the words at the end of the power, “or proportionably for any part thereof,” although no notice is taken of this circumstance by the reporter: for these words, they thought, shewed the intention of the parties, that the quantum of rent, and not any particular part of the premises included in the settlement should guide the tenant for life in the execution of the power.

In *Pomery v. Partington* (*m*) the power in question was in a

(*l*) Per Buller, J., in *Pomery v. Partington*, 3 T. R. 676.

(*m*) 3 T. R. 665.

will to let all or any part of the premises, so as the usual rents be reserved, and the leases made by virtue of the power were to be dishonourable for waste. The question was, whether a lease of tithes which had never been let before was good. The Court resolved that this case was not to be distinguished from *Bagot v. Oughton*, which had been affirmed in the House of Lords. (n) The Court decided this case on the general principle that the words "so as the usual rents be reserved," sufficiently shewed the intention of the testator to confine the power to the premises usually demised; besides which, the clause respecting waste could not apply to tithes. In this case Lord Kenyon, in giving his opinion, said that the counsel who argued the case of *Goodtitle v. Funucan*, in stating *Comberford's* case, had omitted the most important words; namely, that the intent of the parties was to govern. If that be the rule, he observed, and the judges in construing the particular words of different powers have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them erred in the application of the general rule to the particular case before them; for in all the cases they profess to determine according to the intent of the parties. Having cited the passages contained in the preceding extract from the case of *Goodtitle v. Funucan* as to the improbability of an intention to allow a demise of the family mansion, and inferring an intention that the heirs should have the occupation of what was always occupied, and the rent of what was always left, his lordship said, "Now the whole of this reasoning applies most pointedly to the case before us. These *tithes* have never been let, but have always been occupied by the possessor of the estate: I do not think that *Bagot v. Oughton* can be distinguished from this in principle." In this he was followed by the other judges. Buller, J., in adverting to the case of *Goodtitle v. Funucan*, observed that it was a harsh attempt by a young nobleman to set aside the whole lease on account of the trivial value of the fishery, which none of the parties to the settlement ever understood to be exempted from the power of leasing. It is possible that the hardness of the case in respect of its incidental consequences might have a little diverted the judges from the true grounds of the cases settling the question of restriction, and which would have been

(n) 8 Mod. 252.

presented to them, if the value of the fishery had not been so insignificant as in that case.

In the case of *Doe d. Bartlett v. Rendle* (o) a testator devised his lands to certain devisees to uses (improperly called trustees) and their heirs, in trust for the use of A. for life, with several remainders over in strict settlement; and he gave a power to the devisees, and the survivor of them, and the heirs and assigns of such survivor, from time to time during the minorities of the persons to take under the will, and afterwards to any tenant for life under the limitations aforesaid, to grant leases of all or any part of the premises for any term not exceeding three lives, in possession or reversion; so as upon such lease there be reserved the ancient or accustomed yearly rent, heriot or heriots, or other things usually paid for the same premises. After referring to the several cases before stated, the Court said that in *Bagot v. Oughton* the nature of the property proved the intention; and in the present case they thought the intention as plainly proved by the character of some of the persons to whom the power was given. It was given in the first instance to the trustees; and it could never be intended that they who might have an interest for a day only, and who were not intended to have a beneficial interest, should be able to alter the nature of the property and prevent the tenant for life from occupying what the testator had always reserved for his own occupation. The necessary purposes of the power were therefore held to be satisfied by suffering the trustees and tenants for life to let what had been before leased.

Upon the stat. 32 Hen. VIII. c. 38. it has been determined (p) that the lettings to which it refers are by some person seised of an estate of inheritances. But the same doctrine, Mr. Sugden conceives, cannot be applied to powers in private conveyances, although a contrary opinion has been entertained. The stat. 32 Hen. VIII. was intended to have a general and perpetual operation; it was therefore absolutely necessary to establish by whom the lettings must have been made, so as to authorize subsequent demises; and it would have ill accorded with the true spirit of the act to have holden that demises by persons having partial interests only constituted the standard to which the act refers: but, in the case of private powers, the parties creating them must be pre-

(o) 3 M. and S. 99.

(p) See ante.

sumed to know by whom such leases have been usually granted; and if they disapprove of the mode in which any part of the lands have been demised, it lies upon them to expressly declare their disapprobation, by excepting them out of the power.

The usual letting intended in powers of this kind must be understood of leases properly so called; terms for years therefore for raising money by mortgage, or for the purpose of family arrangements, are not such usual modes of demise as will authorize leases under such powers. But, leases made in trust for the lessor or his children being not unusual by ecclesiastical persons or tenants for life having power to make leases, such leases will enable under powers requiring the land to have been usually demised. In the case, therefore, of *Right d. Basset v. Thomas* (q) the Court held a covenant to stand seised to be in all respects a lease for this purpose. But in the case of *Doe d. Wyndham v. Halcombe*, (r) where it appeared that the power was to lease for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such part of the estates as were then demised for that time; the words "for that time" were considered to mean for one, two, or three lives, or for any number of years determinable on one, two, or three lives. The power therefore was held not to include lands which had been demised in a family settlement, in the following manner, *viz.* for the term of ninety-nine years, if A. (the son of the lessor) or any woman he should marry, and who should be his wife at the time of his decease; and any of his body lawfully begotten, or to be begotten, which should be his eldest son living, or in *ventre sa mere* at his decease; or if at that time he had no son born nor in *ventre sa mere*, then, if any, his eldest daughter should be then living, or in *ventre sa mere*; or any or either of those three, namely, of the said A. and such his wife and son, if any, or daughter, if no son, at the time of his decease, should so long live; remainder to B. (another son of the lessor) for the term of ninety-nine years (in the same manner;) yielding and paying during the said term the yearly rent of twenty shillings, with a proviso that the lessor might revoke the said term during his life; the power of leasing being only held to extend to leases, such as are usual where all the lives are certain and co-existing.

With respect to the rent, the power may be given either to lease at

(q) 1 Blackst. 446.

(r) 7 T. R. 713.

the ancient and accustomed rent, or by some other equivalent expression; which generally implies a power to lease upon fines: but this power is not now usually given, except in respect of premises that have long been subject to such leases; and where the emolument of the lessor principally consists of fines upon renewals. The power may also be to lease upon rack rent, or, as it is generally expressed, in creating the power, "the best and most improved rent that can or may be reasonably gotten for the premises;" and it is commonly added, as part of the condition, that "no fine or foregift shall be received or taken in respect of any such lease."

In a recent case, (s) the power was contained in a will made in 1759, to demise for twenty-one years, reserving the most rent that could be got for the same, and to demise other premises for sixty-one years, reserving the usual or other the best rent that could be had, &c. The testator died in 1764. At the time of his death the premises were subject to a lease granted by a former owner, in 1741. for forty-one years at the rent of 6*l.* for which lease a fine had been paid. In 1772 the premises were demised for sixty-one years at the rent of 10*l.*, and a fine was taken; and a similar demise was made in 1811, upon the surrender of the former lease, the premises being then worth to be let for such a term 50*l.* a year, and the lease was adjudged to be good. Lord Ellenborough observed, that the interest of the remainderman had been improved; for the rent had been a better rent. It was something more than the usual, though less than the most: but it might be either usual or most. Suppose these lands had become situate in a ruinous part of the town; in such a case the tenant for life might not have been able to get the usual rent, and then he was to get the most. The other judges concurred; and Dampier, J., in the course of the argument, said, that he had always considered "usual" in these powers as contrasted with "most".

Although there is no express provision in such powers that leases made by virtue of them should not be dispunishable for waste. It is obvious that leases cannot be so made, unless it appears to be the intention of the parties creating the power that leases made in pursuance of the power should be so exempt.

The plan of the power generally given to the tenant for life is

(s) *Doe d. Newnham v. Creed*, 4 M. and S. 371.

for the mutual advantage of both the present owner and the remainderman. The lease consequently to be made by virtue of such powers must be a *bond fide* contract between the lessor and lessee for the purpose of farming and improving the land. Where, therefore, a lease was made by virtue of such a power for three lives, for the purpose, as it was expressed in the indenture, of preserving the reversion from being barred by recovery, or any other act of the remainderman, this lease was held void because it appeared that the lessees had executed no counterpart, and had never been in possession, nor paid any rent. The Court said in this case there was not even colour enough to make a question; for it did not appear that the lessees knew of the making of the lease. (s) It is however no fraud on the power, or on any of the statutes before mentioned, that the lease should be in trust for the lessor; because it is of no importance to the successor, who has the beneficial interest, so long as he receives the accustomed rent, or the rent stipulated for by the terms of the power. (t)

It was the opinion of Lord Mansfield, that the execution of powers should receive the same liberal construction at law as in equity; (u) because the statute of uses had transferred that mode of real property from equity to law: this opinion, however, must be received with some qualification. A strict literal execution of a power must be the same in both courts: because where a power has been executed in an adequate manner, so as to be a perfect instrument at law, the equitable claims are identified with the legal. But courts of law have no jurisdiction to compel the parties to recede from their legal rights, if they are only bound in equity. Courts of equity, on the other hand, will support the execution of a power for a meritorious consideration, almost in any form; and, though not a good execution any where, a court of equity will enforce the substantial intention of the party executing it, by taking care to have it executed in a proper manner. (x) On this principle Lord Redesdale decided, (y) that where a tenant for life entered into an agreement to lease in conformity to his power, it was binding on the remainderman. In the case last

(s) *Doe d. Atkyns v. Horde*, 1 Lef. 52. 66. *Wykham v. Wykham*, Burr. 60. 18 Ves. 395. 415. *Foone v. Blount*,

(t) *Wilson v. Sewell*, 4 Burr. 1975. Cowp. 467.

(u) *Zouch v. Woolston*, 2 Burr. 1146.

(y) *Shannon v. Bradstreet*, *supra*.

(x) *Shannon v. Bradstreet*, 1 Sch. &

cited,(2) Lord Redesdale intimated an opinion, that the remainderman was also affected by lying by, while the lessee was expending money on the estate, and by neglecting to bring his ejectment till the assets of the tenant for life should have been administered.

A tenant from year to year does not seem to come within the class of persons entitled to the aid of a court of equity, although in *Campbell v. Leach*, (a) Lord C. J. De Grey said, that such a tenant might be deemed a purchaser. The parties in whose favour a defective execution of a power is supplied in equity are wives, children, creditors, and purchasers, for valuable consideration, which last include lessees in common farming or other leases paying a fair consideration by way of rent or fine, or improving the premises. An opinion, says Mr. Sugden, has very generally prevailed in the profession, that, as Mr. Powell expresses it, "the lessee under the power must stand or fall by that title only; and if that will not bear him through as effectually made under a complete and perfect execution of the power, the right of the remainderman to possess the estate free from the lease will take place of the right of the lessee as superior to it." For in this case the lessee has no claim to any equitable interposition in his favour; and this opinion seems, at first view, to derive support from *Temple v. Baltinglass*, (b) where a bill filed to supply a defective execution of a power to make leases, which had been held void at law, was dismissed with costs: but there appears to have been great laches on the part of the tenant, and some of the leases were not authorized to be leased by the power. (c) On the other hand, in a case in 1698, the M. of the R. took this distinction, that where a lease is made purely voluntary, and no provision for a child, there, if a lease be not good at law, it shall never be made good in equity. But if a lease be made to a tenant at rack rent without fine, *which is voluntary*, (d) yet if the tenant hath been at any considerable expense in building or improving, there the Court will supply the defective execution, and otherwise not. (e) Now, from this, it is clear that the M. of the R. was of opinion, that where the lessee was in

(2) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52.

(a) *Ambl.* 740.

(b) *Finch.* 275. See also *Doe d. Ellis v. Sandham*, 1 T. R. 706.

(c) *Doe v. Sandham*, 1 T. R. 705. *Sandham v. Medwin*, Exch. March 2; 1789. MS. same point.

(d) *Sub modo* only. See *ante* p. 33.

(e) *Anon.* 2 Freem. 224.

the nature of a purchaser, he should be helped against a defective execution of a power. There appears to be no ground, continues Mr. Sugden, for aiding a defect in favour of a mere tenant at rack rent, although holding under a lease; much less can the relief be afforded to a tenant from year to year, holding under a parol, or even a written contract. The part performance of the agreement by taking possession, &c. is not material; because, even if an actual lease had been granted, the defect in it could not have been supplied. The lessee paying the full value for the estate, and that only during his occupation of it, cannot, according to Mr. Sugden, be put on the footing of a purchaser who would sustain an actual loss, if equity were not to interpose his aid; but where the lessee has expended money on the estate, he then, says Mr. Sugden, becomes a purchaser of the interest granted to him, and may well be entitled to the aid of equity. This doctrine, however, is not convincing; and raises a distinction which is by no means either solid or consonant with the liberal construction which the law has imposed on the term "purchaser" in other cases; especially with reference to voluntary conveyances under the statutes of Elizabeth. The term actual loss is also ambiguous; since, in all cases of farming leases, the contract can never be considered to be made without consideration, although no fine is paid; and we must suppose a mutuality where there is no favour or bounty intended.

An instrument executed by a smaller number of persons than required by the power is good in equity against those executing. (e) In *Campbell v. Leach*, (f) under a power to lease in possession, a new lease was granted to a person during the continuance of a former lease to him and another. The former lease was abandoned: but not surrendered. It was admitted that the new lease was bad at law, and it was doubtful whether the best rent was reserved. The bill was filed to supply the defect against the remainder-man, by the lessee, who had been at great expense. In this case, Lord Bathurst, assisted by Lord C. B. Smythe and Lord C. J. De Grey, reversed a decree at the Rolls against the lessee, and directed an issue to try whether the rent was the best that could be gotten.

(e) *Wilkie v. Holmes*, cited 1 Sch. & Lef. 60.

(f) *Ambl. 740. Sugd. Pow. App. No. 14. 3d edit.*

In none of the cases in equity has the intention of the person creating the power ever been defeated. If the power be given to be executed by deed, to him it is immaterial whether it be executed by deed or will: if three witnesses be required, it is unimportant whether it be executed in the presence of three or two, so that the interest created is authorized by the power. But equity cannot uphold an act which would defeat the intention of the person creating the power. (g)

It is said to have been several times determined in equity that if one, having a power to lease for ten years, makes a lease for twenty, such a lease is good for ten years. But it may be doubted whether such a lease could be supported in equity in the present day, unless it be made in favour of persons who are peculiarly the objects of the protection of a court of equity, namely, creditors or purchasers for valuable consideration without notice. (h) On this principle, where a person having a power to make leases for twenty-one years in possession made a lease for twenty-one years to begin at a future day, it was supported in equity, because it was in trust for the payment of debts. (i)

In the case of *Gooding v. Gooding*, (k) a man made a voluntary settlement on his son for life, with remainder to his son's first and other sons in tail, with a power to his son to make a lease in possession for ninety-nine years, determinable on three lives: the son having made a lease to his father in trust for one of his younger children, not pursuant to the power, it was nevertheless decreed good, and taken to be a lease made by the father after a voluntary settlement. But this seems to come within the principle laid down by Lord Nottingham, in *Sayle v. Freeland*. (l) Where he declared that there was a great difference between a power which one reserved of disposing of his own estate, which, therefore, deserved all the favour imaginable in expounding it; and a power created in favour of one who is not the owner of the estate, which, inasmuch as it tended to charge the interest of a third person, ought to have the strictest construction. The case of *Gooding v. Gooding* is not precisely the case of one reserving a power to dispose of his own estate: but the father was privy to

(g) Sugd. Pow. 369. 3d edit.

10. *Edlin v. Battely*, 2 Lev. 152.

(h) *Wilkie v. Holmes*, 1 Dick. 165.

(k) 1 Eq. Ca. Abr. 342.

Campbell v. Leach, Amb. 740.

(l) 2 Ventr. 350.

(i) *Pollard v. Greenvill*, 1 Ch. Ca.

the making of the lease, and had notice that it was not pursuant to the power which he himself had created. (*m*) The distinction, however, here mentioned, is said by Mr. Sugden to be now exploded. (*n*)

Where both the tenant for life and the remainderman are volunteers, and equally the object of the bounty of the person creating the power, the execution of it must be taken strictly, because it cannot be the intention of the grantor to favour one party more than the other: but where the execution of the power goes in diminution of the interest of a third person who comes in for valuable consideration, it is still more deserving of a rigid construction. Nor does it appear that a court of equity will make any difference where the person claiming under the power is a purchaser for valuable consideration, if the other happen to be so too. (*o*)

If tenant for life, without any authority, make a lease for years, and after his death the tenant pay rent to the remainderman for several years, the lease is nevertheless void; especially if the remainderman be ignorant of his rights. (*p*) It is said, however, (*q*) to be the course of the Court of Chancery, that where a tenant for life, without authority, makes a lease for years, and the lessees apprehending that the lessor has a power to make such a lease certain, lay out great sums in improvement, and he in reversion stands by and lets them go on without giving notice that the lessor was only tenant for life, the Court of Chancery has in such a case decreed the lessees the remainder of the term after the death of the tenant for life; or, more properly, the Court has decreed a new lease for the remainder of the term: for by the death of tenant for life the old lease is absolutely void, and neither a court of law nor a court of equity can revive it.

It is no ground for relief in equity that the party intended to exercise his power, but was prevented by sudden death. (*r*) But, in laying down this rule, a distinction should be made between mere powers, and powers in the nature of trusts. Powers are

(*m*) Anon. 2 Freem. 225. Fothergill v. Fothergill, *ibid.* 257. Dougl. 53.

(*q*) Anon. Bunb. 53.

(*n*) See Sugd. Pow. 567. 3d edit.

(*r*) Pigott v. Penrice, Com. 250.

(*o*) Evelyn v. Evelyn, 2 P. Wms. 659.

Holmes v. Coghill, 7 Ves. 499. 12 Ves. 206. Hixon v. Oliver, 13 Ves.

(*p*) Doe d. Simpson v. Butcher, 114.

never imperative; they leave the act to be done at the will of the donee: trusts are always imperative, and are obligatory upon the conscience of the party intrusted. Powers are in the nature of trusts when a man is invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, equity will carry the trust into execution at the expense of the remainderman, and without any regard to the person in whose favour it is to be executed being a volunteer, and not a purchaser, creditor, or child. (s) The question whether a power is simply such, or a power in the nature of a trust, frequently arises on a power to appoint to children. There are no cases which illustrate directly this part of the subject: the case of *Brown v. Higgs* (t) may, however, be now mentioned, although it seems strictly to belong to a future part of the present treatise. A leasehold estate was bequeathed to A.; and, after directing him to pay certain sums, the testator empowered him to employ the residue of the rent "to such children of my nephew Samuel Brown, as the said A. shall think most deserving, and will make the best use of it." This was considered, in default of appointment, as a trust for all the children. This decree was affirmed by Lord Alvanley, M. R. on a rehearing, (u) and also by Lord Eldon, on appeal; (x) and has since been confirmed in the House of Lords. (y)

It holds generally true, that a power to create leases, or any other estate to take effect in possession, will control and overreach all the estates in the settlement. Thus, where (x) lands were settled on A. for life, then to trustees for a term upon such trusts as A. should direct, and then to uses in strict settlement, with a power of leasing to A., and he executed his power of leasing after declaring the trust of the term for creditors: the lease was held to be prior to the trust for creditors, because the term was originally subject to the power. (a) The moment the power is executed, the estate created takes effect as if it had been in the original deed. Where several powers have been given by

(s) See Sugd. Pow. 393. 3d edit.
Brown v. Higgs, 4 Ves. 708.

(t) *Supra*.

(u) 5 Ves. 495.

(x) 8 Ves. 561.

(y) See Sugd. Pow. 396. 3d edit.

(z) *Talbot v. Tipper*, Skinn. 427.

(a) See *Beale v. Beale*, 1 P. Wms.
 244. *Mosley v. Mosley*, 5 Ves. jun.
 248.

the same deed, and two or more have been executed, and no provision has been made in regard to their priorities, the intention of the settlement and the object of the powers must be the best guides to the construction. But it is usual in the settlement to provide for the priority of the several powers contained in it. (b)

The following general observations may be here inserted. Where leases are absolutely void against the remainder-man or reversioner, the assignees of the reversion are entitled to the same benefit as the assignors: but the right of election as to voidable leases cannot be transferred. Therefore the better opinion seems to be, that the wife, by joining in a fine of the reversion before her time of election comes, destroys her power of avoiding a lease made of her estate during the coverture: and the fine cannot transfer a similar power to the conusee, because the wife's power was in action, and peculiar to her by reason of the coverture. (c) So if the issue in tail after the death of his ancestor aliens before entry, or receipt of rent, the alienee has no power of avoiding the lease, because it was only voidable by the entry of the issue. (d) But where tenant in tail makes a lease to commence *in futuro*, and his issue aliens by fine or feoffment before its commencement, it is said that the election to affirm is transferred to the feoffee or conusee: and the reason given is, that such right of election gives neither a right of entry, nor a right of action; which can only be understood of that kind of conclusion which has been already mentioned. (e) If a tenant in tail, with reversion to himself in fee, after having made a lease for life or years, levies a fine; the conusee cannot avoid the lease; because the lease was a charge both on the estate tail and the reversion; and the effect of the fine is to let in the charges upon the reversion. (c)

Where leases are voidable only, they may be sometimes void as to particular persons, and yet not lose their voidable or affirmable

(b) Sanders on Uses, 158. 162. 3d edit.

(c) Caddee v. Oliver, 3 Leon. 153. Cro. Eliz. 152. Adjourned according to both reports. Harvey v. Thomas, Cro. Eliz. 216.

(d) Dy. 51. b. 1 Roll. Rep. 403. 3 Leon. 156. 2 Bulstr. 46. 4 Mod. 5.

Crocker v. Kelsey, W. Jon. 60.

(e) Ante, Opey v. Thomasins, 1 Sid. 260.

(f) Symonds v. Cudmore, 4 Mod. 1.

nature. If a bishop, for instance, makes a lease for years at the common law, the king, during the time the temporalities are in his hands, may avoid the lease; and yet the successor after the restoration of them may affirm and re-establish it. (f) So where the wife of tenant in tail is endowed of the land demised, although she may avoid a lease made by her husband during coverture, the issue in tail by acceptance of rent and waiver of the possession may set it up again after her death. So if tenant in tail make a lease for years, and dies, leaving his wife *privement ensient*, but leaving no other issue, and the donor enters, and after the birth of a son the lessee re-enters, the issue at full age may affirm or avoid the lease. (g) But if the avoidance is once made by one who has the whole inheritance or fee simple in him, it is defeated to all intents and purposes, and never can be revived. (h)

Acceptance of rent is one of the ways in which such voidable leases may be affirmed: but there are many other ways in which acquiescence may be shewn. If a lease be made for life with remainder for life to another, acceptance of rent from tenant for life will affirm the remainder over. (i) If the election is made to avoid, it must be done by entry where the lease is of corporeal hereditaments, and by claim where it is of incorporeal. (j)

Where (k) a bishop's bailiff mentioned generally that there were rents in arrear, and was directed to collect them, and amongst the rest collected the rent on a voidable lease, and paid all the rents over to the bishop without any particular notice, it was held that the bishop was bound by the acceptance: but acceptance by the bishop before restitution of the temporalities, is not binding; because till then he is not bishop. (l) A distinction under this head has been made between leases for lives of things lying in grant, and leases for years. It has been said that the latter may be confirmed by acceptance of rent by the successor, but the former not: the reason given is that no distress can be made, and formerly no debt lay upon a freehold lease during its continuance. (m)

(f) Co. Litt. 46. a. Earl of Bedford's case, 7 Rep. 7. b.

(g) Godb. 325,

(h) Wootton v. Hele, 1 Mod. 291. Goodright d. Carter v. Strahan, Cowp. 203. 4 Vin. Abr. 101. Bac. Abr. Lease. D. 3.

(i) Geoffrey v. Coite, 1 Leon. 243. Litt. s. 521.

(j) Bac. Abr. Lease. H. 2, 3.

(k) Wheeler v. Danby, cited Cro. Car. 95.

(l) Bp. of Oxford's case, Palm. 174.

(m) Rickman v. Garth, Cro. Jac. 173.

So a lease made by a corporation aggregate, contrary to the restrictive statutes of Elizabeth, is not confirmed by acceptance of rent by the succeeding dean or other head. A confirmation by deed of the whole corporation might probably be deemed good. (n)

Although all leases by tenants for life or years fall off absolutely after the determination of the estate of the lessor, yet, during the existence of the estate of the lessor, they are capable of confirmation: but since during that time they are neither void nor voidable, something more than a bare assent of the remainderman or reversioner is necessary, because there can be no relation existing between him and the lessee. The confirmation therefore must be by deed: it must however be clear that the party confirming is fully acquainted with his rights; that he knew the lease was impeachable; and that under no influence he freely and spontaneously executed the deed. (o)

It has been already observed that a common law lease of a copyhold estate by the copyholder without licence is a cause of forfeiture in all cases except in that of an infant. The estate of a feme covert is entitled to similar protection; and therefore, although a lease at the common law of her copyhold lands by her husband is a cause of forfeiture during the coverture, after that is determined the wife or her heirs may enter and avoid the forfeiture because the husband could not forfeit more than he could grant, which was for his own life. (p) But if the widow affirm the lease after her husband's death, this will occasion a forfeiture.

If a copyholder makes a lease so as to incur a forfeiture, and the lord dies before entry and seizure, the cause of forfeiture does not descend to the heir: (q) neither can the remainderman or reversioner take advantage of it, because the cause of forfeiture was before their time. So also if there are two coparceners of a manor, and after a lease without licence one dies, the survivor and the heir cannot enter; nor can the survivor enter for her moiety;

(n) Magd. Coll. case, 11 Rep. 70.

Head v. Chaloner, Cro. Eliz. 149.

(o) Roche v. Brian, 1 Ball and Beatty 330.

(q) Palm. 416. 1 Mod. 200. 1 Bulstr. 190. 2 Sid. 8. 1 Salk. 186.

(p) Savern v. Smith, Cro. Car. 7.

for both coparceners make but one heir, and the forfeiture cannot be divided. (r)

If the lord after such a lease makes a feoffment or a lease for years of the freehold of the copyhold estate to another, the feoffee or lessee cannot take advantage of the forfeiture; for the feoffment or lease by the lord before entry is an assent in the nature of a confirmation of the copyholder's lease. (s) So acceptance of rent or any other act of acquiescence on the part of the lord, with notice of forfeiture, will be a confirmation, though subsequent to the lease. (t)

A licence, as has been before observed, is merely a dispensation of forfeiture; and this dispensation, if good for one moment, is a dispensation for ever: a licence, therefore, may be always granted by the lord for the time being, although he should be only tenant at will. (u)

According to Lord Coke, (x) a steward of a manor cannot *virtute officii* grant a licence, though in full court, and in the name of the lord; there must be express words in his patent to enable him to do so, or a special authority from the lord, or a particular custom. This doctrine is also adopted by Gilbert in his Treatise of Tenures: (y) but, according to Mr. Watkins, granting the law to be with Lord Coke, any act of the lord, or even tacit acquiescence on his part after the grant of such a licence by the steward, with notice, would amount to a confirmation, as if the lord signed the court book in which an entry of the licence had been made, or received the fees on the licence, or any similar circumstance. Besides, adds Mr. Watkins, the copyholder applying for such licence in full court is surely not obliged to crave oyer of the steward's appointment. (z)

The lord may grant a licence on a condition precedent, as it will not operate as a licence till the performance of the condition: but he cannot grant a licence on a condition subsequent, as he gives nothing, but only dispenses with the forfeiture. The condition would be annexed to another's estate; because the estate passes from the copyholder, and this the lord has no authority to

(r) Anon. 1 Freem. 516.

(s) Penn v. Merival, Owen 63. Cornwallis's case, 2 Ventr. 38.

(t) 1 Keb. 15. Per Twisden, J.

(u) Watkins on Copyh. tit. Licence.

(x) Co. Copyh. s. 44. tr. 100,

(y) Gilb. Ten. 333. Kitch. 85 *contra*.

(z) Watkins' Copyh. Licence, note *ad locum*.

do. (a) So neither can the lord dispense with a condition annexed to another's estate: therefore if the lord licenses a tenant in tail of a copyhold to demise for years, a lease by tenant in tail accordingly will not bind the issue in tail; for a licence is only a dispensation as to the lord, and passes no estate. (b)

If the lord enter into an agreement to grant a licence, equity will compel him to perform it. (c) So a custom that, on the payment of ten years' rent, the lord should license for ninety-nine years, and in case he should refuse that the tenant might lease without licence, has been held a good custom. (d)

As a licence is an express authority from the lord to do a particular act, it must not only be executed in his lifetime, or during the continuance of his estate in the manor; but the terms of the licence must be strictly pursued. If therefore the copyholder having a licence to lease from Michaelmas last demises from Christmas next; this lease will not be authorized by the licence. (e) So if a copyholder in fee have a licence to demise for years, if he so long live, a demise for years absolutely is not good: but if he were tenant for life only, it would be otherwise, because the condition would be implied, as the lease could endure no longer than his life. (f) So if the copyholder has a licence to lease, which he executes accordingly; a concurrent lease would be a cause of forfeiture, because the licence is satisfied by the first lease. (g) In all these cases forfeiture is the consequence of a deviation from the licence: but if the licence is for five years, he may lease for three or any less term than his licence specifies. (h)

A licence expires with the lord's estate who grants it: all acts therefore done in pursuance of it have no validity beyond that time; and leases made under it consequently are void against the succeeding lord. (i) But since the lease is a common law interest, it may endure even longer than the estate of the copyholder himself; for in the case of an escheat the lease is good against the

(a) Poph. 106.

(b) Kitch. 84.

(c) *Hungerford v. Austen*, Nels. Ch. Rep. 49.

(d) *Grove v. Bridge*, cited 2 Keb. 344.

(e) *Jackson v. Neale*, Cro. Eliz. 395.

(f) *Haddon v. Arrowsmith*, Cro. Eliz. 461. *Worledge v. Benbury*, Cro.

Jac. 436.

(g) Moor. 184. pl. 329.

(h) Cro. Jac. 436.

(i) *Petty v. Evans*, 1 Roll. Abr. 511.

Munifas v. Baker, 1 Keb. 25.

lord who granted the licence, though void against him in the remainderman or reversion. (*k*)

With respect to charity leases where trustees have usually the legal fee, no precise rule can be laid down as to the mode in which they should be made. Trustees of charity estates may make leases for any number of years : but if they are unreasonably long without any circumstances to shew that they were made in the fair management of the estate, and for the benefit of the charity, they will be set aside by the Court of Chancery as a breach of trust. It has been determined, therefore, that the trustees of a charity cannot make a mere husbandry lease for ninety-nine years upon terms and at a rent adapted to a lease for twenty-one years, and not improvable or capable of increase during the whole of that term. (*l*) So as to a building lease, a lease for nine hundred and ninety-nine years, upon terms adapted to a lease for ninety-nine years, has been considered a breach of trust. (*m*) Sir W. D. Evans observes on this doctrine, that in Lancashire it is not very usual to take land for building, except on a conveyance in fee or an interest equivalent to the fee, and the rents are generally the same from the beginning to the end. With respect to building leases, he also makes a query, whether a contract is so clearly objectionable for not providing for an increase of rent from time to time? It is certain that for a long time there has been a general increase in the rate of land, which arises from a gradual depreciation in the nominal rate of money; but that is an increase which has arisen in a great measure from adventitious circumstances, and very much influenced by political causes; the nature and extent of which are much beyond the reach of previous calculation. In other respects the increase of the value of property has depended very much on local circumstances: but when no accidental circumstances intervene, a property, of which the material part consists in buildings, must be of much less intrinsic value at the end of a long lease than at the commencement.

(*k*) *Turner v. Hodges*, Hutt. 101.
Co. Coph. s. 34. tr. 72.

(*l*) *The Attorney-general v. Owen*,
10 Ves. 555.

(*m*) *The Attorney-general v. Green*,
6 Ves. 452. *The Attorney-general v.*
Griffith, 13 Ves. 565.

A lease of a charity estate for eighty years has been supported as to the interest of a sub-lessee, where it appeared that he had given a fair consideration and without notice, except that the premises were part of a charity estate; and as to the original lease an inquiry was directed whether it was reasonable. (n) It will follow from this case, that where there are under-lessees notice that the estate is a charity estate, is not sufficient notice that the original lease is a breach of trust. The possession therefore of derivative lessees is seldom disturbed, because they are in general innocent purchasers; and indeed there is not the same probability that their leases should have been obtained at an undervalue.

That a lease of a charity estate may be set aside for undervalue, if considerable, is a point on which the decisions leave no doubt. (o) But where (p) the lessee underlet the premises at a fine upon advantageous terms, this circumstance was not considered conclusive evidence of the premises having been originally leased at an undervalue. The fine might be considered as partly in consideration of the good will of a trade established by the lessee, and partly of repairs. An inquiry was therefore directed to ascertain whether the rent was fair and adequate, distinguishing how much of the premium resulted from the good will and repairs, and how much from the value of the lease above the rent reserved to the charity.

In the case of the Attorney-general v. Wilson, (q) the trustees took a beneficial interest, for the lands were given to the masters and ushers of a school for the maintenance of the school. The leases complained of were for twenty-one years at very low rents. The master of the rolls said the short duration of the leases was immaterial; but that such leases were not to be encouraged on two accounts: the trustees not doing their duty, and the lessees getting the lands at low rents. It has, however, been stated as the opinion of Lord Eldon, (r) that it does not necessarily follow, that because a tenant has got a lease of a charity estate at too low

(n) Attorney-general v. Backhouse, 17 Ves. 283.

(p) The Attorney-general v. Magwood, 18 Ves. 315.

(o) Duke's Ch. Uses, 43. 67. The Attorney-general v. Lord Gower, 9 Mod. 224. The Attorney-general v. Cross, 3 Meriv. 540.

(q) 18 Ves. 519.

(r) Ex parte Skinner, 2 Meriv. Ch. Ca. 457.

a rent with respect to its actual value, he is therefore to be turned out, if it appears that he himself has acted fairly and honestly. The only ground for so dealing with him would be some evidence or presumption of collusion, or corruption of motive. If for instance the tenant happens to be a relation of the trustee, that is a circumstance to create suspicion. It ought to be remembered too, that the case of a charity is one in which of all others the security of the rent is the first object to be regarded; and therefore in such cases the inadequacy of the rent reserved is less a badge of fraud than it would be in almost any other instance. So, in order to set aside such a lease, it is not sufficient to say that the mode of letting is not the best that might be described, but it must be shewn to be so bad that no person meaning to discharge his trust fairly could have resorted to it. (s)

In *Attorney-general v. Cross*, (t) speaking of the estimate of witnesses who valued the estate in 1816, as to its value in 1801; by which it was said that a fine of 1050*l.* should have been 850*l.* more, the master of the rolls said, that it did not appear that any of these witnesses ever had occasion to survey the farm with a view to a correct estimate of its value: but in the year 1816, upon loose recollections they enter on a computation of the value in 1801. He could not put that kind of evidence into competition with a survey made at the time, for the very purpose of ascertaining what the fine was that ought to be required on a new lease, by a person (surveyor of the lessor) having no interest to undervalue or diminish the fine.

Where (u) a decree, pronounced in 1670, against the trustees of a charity, the impropriate rectors and others interested in the application of the funds, to which suit the Attorney-general was not a party, had directed the trustees under the indemnity of the court to perform an agreement for granting a lease of tithes for 990 years at a fixed pecuniary rent, and the conveyance had been executed and rent constantly paid, and the lands enjoyed in conformity to the decree, the court refused to set aside the lease on the information of the attorney-general at the relation of the pre-

(s) *The Attorney-general v. Cross*,
3 Meriv. 540.

(u) *The Attorney-general v. Warren*,
2 Swanst. 291.

(t) *Ubi supra*.

sent trustees, against the person claiming under the plaintiff in the former suit. The bill, which was for an account of tithes, did not set out the decree of 1670: but that was set forth by the answer. The bill was dismissed, but without costs. Length of time, though not a bar, was certainly an obstacle to setting aside a contract made near 150 years ago, and acted upon ever since: but in this case the main feature was, that the contract had been brought under the view of a court of justice before it had been executed; and there was no ground for supposing that on that occasion there was any omission fairly to disclose to the court the nature of the contract. As to the Attorney-general not being a party, he had no interest: his office is to see that those who have the legal estate duly administer the property; but he would be no party to the conveyance, the legal fee being in the trustees who were competent to convey. It would indeed have been more fit had he been a party to the suit: but if not, is the decree a nullity, and to be totally laid aside, the information not seeking to impeach it on that ground?

By a private act of the 1 Geo. I. stat. 2. c. 21. the vicar of Stockton on Tees, with the consent of the vestrymen, was enabled to demise certain lands for such terms of years, and under such rents, reversions, or payments, as to him and them should seem meet, provided that the yearly rent to be reserved should be the highest that could be obtained. The vicar and vestrymen leased for 999 years. It was held that the lease could not be set aside. Neither was the case analogous to charity leases, which were mere matters of trust: because mere length of time was not sufficient to set aside a lease made under a power of an unlimited kind, and without fraud. (u) It was, however, said by the court in another case, (v) that it had authority to control the master and ushers of a school in the exercise of a power to lease for 31 years or three lives, if it should appear to be for the benefit of the charity not to act upon the power.

If trustees in private conveyances have a power to make leases, and do not pursue their power in making them, such leases will not be permitted by a court of equity to take effect out of their

(u) *The Attorney-general v. Moses*,
2 Madd. Ch. Ca. 294.

(v) *Ex parte Berkhamstead School*,
2 Ves. & B. 138.

legal estate, as against *cestui que trusts*. Therefore, where (w) trustees had a power to lease in possession until *cestui que trust* should attain twenty-one, and they made a lease in reversion, and another lease after the *cestui que trust* attained twenty-one, such leases were held to be bad altogether; and the receipt of rent by the *cestui que trust* for several years after he attained twenty-one was held not to operate as a new agreement, because the *cestui que trust* was ignorant of the defects in the lease: but as he had neglected to look into his rights, and the lessees might have expended money on the premises, no account was directed beyond the filing of the bill, and no costs were given.

Lastly, as to the extent of the relief given on setting aside leases. In some cases where the charity has been for the benefit of an individual bearing the character of vicar or schoolmaster, it seems to have been held that the account against the lessee should be taken from the commencement of the interest of the present incumbent: but there were other circumstances in these cases which will not allow them to be referred to as affording a general rule. (x) In some cases the account has been confined to the time of filing the information; or, if it appeared, to the time of demand before filing the information. (y) In one case, (z) which came before the court upon an interlocutory application, a decree had been taken by default, charging the lessee with sixteen years' rent, although he alleged that he had not received it from the tenant in possession. The defendant on a petition for a rehearing was ordered to give security for the amount for which the decree had been taken, which shews that it was at least doubtful whether he might not be chargeable to that extent. The actual decision of the question does not appear. On the other hand regard ought to be had to the improvement of the premises, or to the surrender of a former lease by which the estate of the charity may have been benefited. (a) But no allowance can be made in

(w) *Bowes v. The East London Water Works*, 3 Madd. Ch. Ca. 375.

(x) *The Attorney-general v. Green*, *Attorney-general v. Wilson*, *supra*.

(y) *Attorney-general v. Owen*, 10 Ves. 555.

(z) *Attorney-general v. Brook*, 18 Ves. 236. 496.

(a) *Attorney-general v. Green*, *supra*. The same *v. Backhouse*. The same *v. Griffith*.

respect of payments, by which the charity has not been benefited : for instance, for a payment for the purchase of the lease from the lessee. (a)

The relief in most cases has been without costs : but in the *Attorney-general v. Griffith* the lord chancellor said that he should not thereafter be prevailed upon to refuse costs in any case upon an information filed since the cases of the *Attorney-general v. Green*, and *Attorney-general v. Owen*.

II. We now come to the second main division of this chapter, which relates to the qualifications of lessees.

Infants and married women may accept leases under the usual inconveniences attending all their purchases. In one case (b) the Court is said to have held it to be equivocal whether a lease made to an infant was for his benefit or not : but, since it might be for his benefit, the lease was held only voidable at his election at his full age. Where, however, a lease to an infant is without deed, he will, perhaps, be liable for use and occupation of premises where he resides, according to the principle laid down by Lord Kenyon (c) that infants are liable for necessities : which is a relative term according to their station in life. So if a lease is made to a baron and feme, she cannot disagree to it during the coverture : (d) but if she acquiesces after her husband's death, she will be liable for all arrears of rent in her husband's life. (e) It is said, however, that if in such a case there are any special covenants inserted in the lease, the wife surviving is not bound by them, although she continues tenant by force of the demise. (f) Where a married woman is entitled to property to her separate use, the cases seem not very well agreed how far she may become liable in respect of it. In general, however, she may be considered in equity a feme sole, in respect of the charging or appointing such property. If she, therefore, live apart from her husband, she may contract for the enjoyment of a house and land in respect of such separate property, or any other mode of sepa-

(a) *Attorney-general v. Brooke*,
supra.

(b) *Ketney's case*, Cro. Jac. 320.
1 Roll. Abr. Infants, K. 3. *Kirton v.*
Eliot, 2 Bulstr. 69.

(c) *See Hands v. Slaney*, 8 T. R. 578.

(d) Bro. Agreem. 6.

(e) 1 Roll. Abr. 349, pl. 2.

(f) 1 Brownl. 31.

rate maintenance. (f) So where (g) a married woman having separate property agreed with the landlord to pay an additional rent for her husband's house, in consequence of having it better fitted up, and then died; the lords commissioners dismissed a bill in equity by the husband to have the money returned, and the agreement cancelled.

The nature of an infant's dissent was much discussed in a late case. (h) The plaintiff, an infant, entered into partnership with an adult. The partners took a lease of certain premises from the defendant for the purpose of their trade; the premium for which was paid for, half by the infant in cash, and the other half by bills drawn by the defendant, and accepted by the infant in the joint names of himself and his partner. The infant, the day after he came of age, dissolved the partnership; and four months after such dissolution, the defendant sued the adult partner alone on one of the bills,—accepted a surrender of the lease from him,—abandoned his action, and destroyed the bills. The action was an action of assumpsit for the money (paid as premium as above mentioned,) paid by the plaintiff during his infancy to the defendant. At the trial Park, J. was of opinion, that this money, having been paid on a partnership account, could not be recovered by one of those partners, on whose account the payment was made: but, independently of that, expressed himself to be of opinion that, as the lease was only voidable, the infant ought to have avoided it within a reasonable time after he came of age. On these grounds the plaintiff was nonsuited. The case came on before the Court of Common Pleas to set aside this nonsuit; which was accordingly done, the Court holding that the facts ought to have been left to the jury to determine whether the defendant had not dispensed with formal notice, and disaffirmance of the contract. Dallas, J. In this case some points are clear. I agree that in every instance of a contract voidable only by an infant coming of age, the infant is bound to give notice of the disaffirmance of such contract in reasonable time: and if the case before the Court were that simple case, I should be disposed to hold, that as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time.

(f) See *Stuart v. Lord Kirkwall*, 3 Madd. Ch. Ca. 387. *Greatley v. Noble*, 3 Madd. Ch. Ca. 79.

(g) *Masters v. Fuller*, 4 Bro. Ch. Ca. 19.

(h) *Holmes v. Blogg*, 8 Taunt. 35.

If a copyholder accept a common law lease of his estate, it is an extinguishment of his copyhold tenure: but if such a lease be made by the lord, the lord will be concluded from entering by his own demise. (i) If a copyholder takes a lease of the manor, there is no extinguishment, because the land still remains grantable by copy. (k)

If the tenant in possession accept a new lease, even from a guardian in socage, either to begin presently or at a future time, the first and not the second lease is void: for it operates as a surrender of the first in law, because he thereby admits a power in the reversioner to contract for the possession; and this surrender is immediate and absolute, although the lease is to begin at a future time. (l) But if the king make a second lease to the same lessee, the second lease is void, and does not operate as a surrender of the first. (m)

If a lessee accepts a new lease from the reversioner, of part of the lands only, this operates as a surrender only for that part. (n) But if he accepts a lease of rent, common, estovers, herbage, or the like of the same lands, or if he accept a lease of the same lands at will only, it will operate as a surrender of the first lease, because it is totally inconsistent with it. (o) In the first case, indeed, the difficulty is obviated by an apportionment of the rent, which is allowed in such cases, because land admits of such an arrangement: but in the other case the lessee is relieved from no part of the burthen of the former lease; and, therefore, makes a gratuitous render for what he was previously entitled to. But, if the lessee of a manor takes a lease of the bailiwick of the same manor. (p) Or a lessee of a park take a

(i) Lane's case, 2 Rep. 16. b. Curtis and Cottle's case, 2 Leon. 72. Head v. Tyler, 12 Mod. 123. French's case, 4 Rep. 31. Dunn v. Green, 3 P. Wms. 10. Gilb. Ten. 301. Watk. Copyh. Exting. Vol. I. 357.

(k) French's case, *supra*. Co. Copyh. 172. Sav. 70. Lee v. Boothby, Cro. Car. 521.

(l) Thomson v. Trafford, Poph. 8. Bro. tit. Lease, 14. Dy. 93. b. Perk. 2. 617. 3 Leon. 244. 5 Rep. 11. Hutchins v. Martin, Cro. Eliz. 605. 2 Roll.

Abr. 495. Dy. 110. Sheph. T. 300. Fulmerton v. Steward, Plow. 102. Willis v. Whitewood, 1 Leon. 322. See 4 Leon. 161. pl. 267.

(m) Lane 23.

(n) Fish v. Campion, 2 Roll. Abr. 498. 1 Danv. Abr. 505. pl. 5. 509. pl. 1.

(o) Cro. Jac. 84. 173. Cro. Eliz. 873. Moor. 636. Ives v. Sams, Cro. Eliz. 521.

(p) Gibson v. Searle, Cro. Jac. 84. Gage v. Peacock, Noy. 12. Godb. 153.

lease of the office of park-keeper, there is no surrender, because these are distinct things which formed no part of the first contract. (q)

It is now settled that to constitute a good surrender in law, the second lease ought to be a good demise to pass an interest such as was intended by the parties: (r) but if the lease is merely voidable, or affected with a condition, it will still operate as an absolute surrender. (s) In the case, indeed, of *Davison v. Stanley*; (t) the Court decided in favour of the tenant: but it seems to have done so on the ground of fraud; for the lessor having, while seised in fee, made a lease for ninety-nine years, afterwards settled his estate, and took back an estate for life only, with a power of leasing; he then granted a second lease for ninety-nine years to the same tenant, which was not according to his power without giving notice to the tenant that his authority was limited: the Court, therefore, held it no surrender. If the second lease is to commence on a contingent event, it will not operate as a surrender till the contingency arrives. (u)

There is no authority in the law that a demise to the same person to whom the lessor has devised the fee, and which is to commence in the lifetime of the devisor, is a revocation of the devise. (v) In such a case the term would be merged in the inheritance when the devise took effect: but if the testator after making his will make a lease to commence at his death to the devisee, this will be a revocation in toto of his will. (x) In the case cited the testator delivered the deed as an escrow, not to be delivered till his death to the lessee; so that it was argued that the lessee might have his election, whether he would take by the deed or the will. But the answer to this argument is conclusive: the two estates could not vest at the same time; for the second delivery of the deed had relation to its delivery as an escrow, and prevented the effect of the will, which could not operate in the testator's lifetime.

(q) *Chamberlain's case*, 2 Roll. Abr. 496. *Zouch v. Moor*, Godb. 413.

(r) *Lloyd v. Gregory*, W. Jon. 405. *Sir T. Sewell's case*, 4 Burr. 1980. *Baker v. Willoughby*, Hutt. 101. *Watt v. Maidwell*, Hutt. 104. *Mellows v. May*, Cro. Eliz. 873. 1 Keb. 295. *contra*. But see *Roe d. Lord Berkley v. The Archbishop of York*,

6 East. 86. *Brown v. Kingston*, 1 And. 33. *Lanc* 22.

(s) *Whitby v. Gough*, Dy. 140.b. *Anon.* 4 Leon. 161.

(t) 4 Burr. 2310.

(u) 4 Leon. 30.

(v) *Cro. Jac.* 49. *Villiers v. Villiers*, 2 Atk. 72.

(x) *Coke v. Bullock*, Cro. Jac. 49.

Persons outlawed, or attainted of felony, may purchase by way of demise : but then it will be for the benefit of the king on office found. (y) In civil cases it does not appear that a person outlawed is incapable of purchasing a chattel interest for his own benefit during the outlawry. (z) A freehold interest he certainly may, for such interests are not forfeited by the outlawry.

If a person is outlawed in a civil action, the plaintiff, on petition to the lords of the treasury, may obtain a lease of the leasehold lands, &c. forfeited, under the exchequer seal : but if the lands be extended, he cannot levy more than the extended value ; and he will be liable to account for the profits with a creditor who has an interest in the same lands by elegit. (a) In the case of freehold lands, he can only obtain a grant of the king's right to levy the profits, since nothing more is forfeited. (b)

Before the late reign Roman Catholics were affected with severe penalties with respect to landed property, unless they complied with the provisions of the acts (c) then in force ; which in effect amounted to an absolute disability to purchase, because the provisions of those acts were incompatible with a conscientious adherence to their religious principles. More tolerant conditions have been recently imposed, to which that body in general do not object ; and, consequently, it can rarely now happen that one professing that religion cannot purchase. (d)

Aliens cannot take a lease of lands for the purpose of agriculture without a licence from the crown, who would be entitled to the forfeiture on office found : (e) but an alien merchant, whose nation is at peace with this country, may take the lease of a house for the purposes of trade or commerce. (f) By the stat. 32 Hen. VIII. c. 16. leases of dwelling houses or shops to aliens artificers are void : and the lessor and lessee shall forfeit five pounds, to be divided between the king and the prosecutor ; but since this statute is of equivocal policy, it has always been construed strictly, in

(y) Co. Litt. 2. a. b.

& 12 W. III. c. 4.

(z) Knowles v. Powell, Owen. 116.
See Gilb. C. P. 14.(d) Stat. 18 Geo. III. c. 60. and stat.
31 Geo. III. c. 32. See Butler's note
to Co. Litt. 391. a. See Gabbett's
Dig. Vol. I. 504, 505.(a) Master v. Whitefield, Hard. 106.
(b) 9 Hen. VI. 20. 2 Roll. Abr. 308.
Gilb. C. P. 15.

(e) Co. Litt. 2. b.

(c) The statutes of recusancy, especially stat. 35 Eliz. c. 2. and stat. 11

(f) Jevens v. Harridge, 1 Saund. 6.
Rex v. Eastbourne, 4 East, 103.

favour of aliens. (g) An alien exercising the trade of a vintner is not an alien artificer within the statute. (h) An alien artificer, however, if he occupy under an agreement, is liable to an action for use and occupation; (i) and is capable of gaining a settlement, if the tenement be of the requisite annual value. (k)

No lease either for life or years is good which is within the statutes of mortmain. When the stat. Magna Charta in 9 Hen. III. (l) had declared all attempts by religious houses to obtain possession of lands or other corporeal hereditaments, under their usual pretences of forfeiture, surrender, or otherwise, void, one of the methods used by them to evade that statute was by accepting long leases for years. The stat. 7 Edw. I. s. 2. commonly called the *Statute de Religiosis*, was then framed for the purpose of preventing this and every other evasion of the restraints upon alienations in mortmain. It was accordingly provided by that statute, that no person, religious or other, should buy or sell, or receive under pretence of a gift or lease, or any other title whatsoever; nor should by any other craft or engine appropriate to himself any lands or tenements in mortmain, upon pain that the immediate lord of the fee, or in his default for one year the lord paramount, or in default of all of them, the king, might enter thereon as a forfeiture. The statute of Magna Charta only extended to religious houses: but bishops and all sole corporations are included in the prohibition of the statute *de religiosis*. The aggregate religious corporations having in vain endeavoured to evade the statutes of mortmain by the invention of fictitious recoveries, had recourse to uses: but these were made subject to the mortmain acts, by the stat. 15 Richard II. c. 5. and were made subject to forfeiture like the lands themselves. Civil or lay corporations were also declared within the mischief, and frequently within the remedy, of those laws. (m) But, during all this time, it was in the power of the crown by granting a licence to alien in mortmain, to dispense with the forfeiture as far as its own rights were concerned, and to enable any spiritual or other corporation to hold lands even in perpetuity.

(g) *Pilkington v. Peach*, 2 Show. 135. Anon. 3 Salk. 39.

(h) *Bridgham v. Frontec*, 3 Mod. 94.

(i) 1 Saund. 8. n. 1.

(k) *R. v. Eastbourne*, 4 East, 107.

(l) 9 Hen. III. st. 1. c. 36.

(m) See st. Westminster the second,

13 Edw. I. c. 32. stat. *quis emptores*,

16 Edw. I. stat. 1. stat. 27 Edw. I.

stat. 3. and stat. 34 Edw. I. stat. 3.

This prerogative was declared and confirmed by the stat. 18 Edw. III. st. 3. c. 3. But as doubts were conceived how far such licence was valid; (n) and as by the gradual operation of the statute *quia emptores*, the rights were reduced into a very small compass; it was provided by the stat. 7 and 8 Wm. III. c. 37. (o) that the crown for the future at its own discretion might grant licences to alien or take in mortmain of whomsoever the lands were holden.

The statutes of mortmain were suspended for twenty years by stat. 1 and 2 P. and M. c. 8.; and afterwards, for the purpose of augmenting poor livings, it was enacted by the stat. 17 Ch. II. c. 3. that impropiators might annex the great tithes to vicarages, and that all benefices under 100*l.* per annum might be augmented by the purchase of lands without licence of mortmain in either case; and a similar provision has since been made in favour of the governors of Queen Anne's bounty. (p)

During the times of Popery, lands were also frequently given to superstitious uses, though not to corporate bodies; and were liable in the hands of heirs and devisees to the charges of obits, chaunteries, &c. The stat. 23 Hen. VIII. c. 10., after declaring that assurances to the use of churches, chapels, &c. in fee or for years, were found to be as prejudicial as alienations in mortmain, enacts that all future grants for the purposes aforesaid, for any longer term than twenty years from the making of any such use, intent, or purpose, saving to cities and corporate towns their ancient customs to devise into mortmain. It has been held, that this statute relates strictly to superstitious uses: therefore, a man may give lands for the maintenance of a school or hospital, or any other charitable use. But as it was apprehended that persons on their deathbeds might make large and improvident dispositions even for these good purposes, it was enacted by the stat. 9 Geo. II. c. 36., (q) which is usually called the mortmain act, that no lands or tenements, or other hereditaments, corporeal or incorporeal, or any money or personal estate to be laid out in the purchase of lands, tenements, or hereditaments, shall be given, granted,

(n) Hawkins, Pl. Cr. 391. Co. Litt. stat. 10 and 11 Ch. I. c. 2. 2 Geo. I. 90. a. Stat. 1 W. and M. stat. 2. c. 2. c. 14. 10 Geo. I. c. 6. 29 Geo. II. c. 18.

(o) Irish Statute, 32 Geo. III. c. 31. 23 and 24 Geo. III. c. 49. and 32 Geo.

(p) St. 2 and 3 Ann. c. 11. See also III. c. 12.

the stat. 29 Ch. II. c. 8. and the Irish (q) No stat. to this effect in Ireland.

aliened, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever in trust, or for the benefit of any charitable use whatsoever: unless such gift, &c. of any such lands, &c. sum or sums of money, or personal estate (other than stocks in the public funds be made by deed, indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be inrolled in the court of chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of such stocks six calendar months at least before the death of such grantor or donor, (including the days of transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. The second section provides, that the act shall not extend to any purchase for a full and valuable consideration actually paid at the time of the conveyance or transfer without fraud or collusion; and by the third section all gifts, &c. made contrary to the act are declared to be void to all intents and purposes. The two universities, their colleges, and the colleges of Eton, Westminster, and Winchester, are exempted from the restraint of this act. The proviso limiting the number of advowsons these colleges may hold has also been repealed by the stat. 45 Geo. III. c. 101.; and therefore these bodies may hold any number of advowsons. So by the stat. 43 Geo. III. c. 107. the operation of the mortmain act upon the stat. 2 and 3 Ann. c. 11. (in favour of queen Anne's bounty) is removed. The stat. 43 Geo. III. c. 108. may also be added as an exception; whereby all persons except feme-coverts, infants, and insane persons, are permitted to grant by deed inrolled, or by will, such deed or will to be executed within three calendar months before the death of such grantor or testator, (including the days of execution and death) lands not exceeding five acres, or goods and chattels not exceeding 500*l.*; for building, repairing, or otherwise

providing of churches, chapels, and of houses for the residence of ministers; and the providing of churchyards and glebes. But it is likewise provided, that only one such gift shall be made by one person, and where it exceeds five acres or 500*l.* the chancellor may reduce it. So also, if the glebe consist of upwards of fifty acres, it cannot be augmented with more than one acre; and if more be given, the chancellor may reduce the quantity.

Upon these statutes of mortmain it may be observed, that as far as leases are concerned, they only operate upon such leases as are evasive of the restraints on mortmain. Therefore bodies corporate and spiritual persons, unless restrained by other acts, may take farming leases, or leases of houses for the purpose of occupation, without a licence to take in mortmain. Secondly, the statute *de religiosis*, and the other acts relating to alienations in mortmain, are still in force, notwithstanding the statute 9 Geo. II. c. 36.: for it expressly excepts *bona fide* purchases for an adequate valuable consideration, and even where bodies corporate take by force of the stat. 9 Geo. II. c. 36. they must notwithstanding have a licence to purchase in mortmain. Thirdly, leases within the statute *de religiosis*, and the other mortmain acts, if not void by the stat. 9 Geo. II. c. 36. are only voidable by the entry of the king, or any of the intermediate lords of the fee. Lastly, the stat. 9 Geo. II. c. 36., may be considered as operating upon our present subject in two ways, either immediately or mediately. Immediately, by making void all leases for lives or terms for years, which are directly granted either by deed or will, contrary to the provisions of this statute. And mediately, by making void the devise or grant of personal estate, or land to be converted into money, with directions for it to be laid out in the obtaining such demises or grants for lives or years. With reference to this last point, however, it may be observed, that if a large personal estate is given to trustees, and they do not come into equity for directions, there is nothing in the statute to restrain them from buying lands. (r)

A freeman of London by the custom of the city of London may devise lands within the city, but not elsewhere, in mortmain; although there seems to be no saving of such customs, except in the stat. 23 Hen. VIII. c. 10. of superstitious uses. (s)

(r) *Vaughan v. Farrer*, 2 Vez. 188. (s) *Middleton v. Cator*, 4 Bro. Ch. Ca. 409.

A distinction has been sometimes made between deeds avoided by the common law, and by particular statutes. It is a saying of Lord Hobart's, (*t*) which has often been quoted, that "the statute (law) is like a tyrant: where he comes, he makes all void; but the common law is like a nursing father; makes void only that part where the fault is, and preserves the rest." But this dictum has reference only to certain statutes which positively and inflexibly enact that the whole transaction shall be void. Such are the statutes of usury and some others. But there are many statutes, amongst which are those relating to simony, by which nothing more than the corrupt part of the contract is avoided; and the rest, if it can be separated from the unsound part, is left to its operation at common law. So in the statute (*u*) we have been considering there is nothing which makes the entire deed void. The words are: "all gifts, &c. shall be absolutely and to all intents void;" that is, so far as they relate to charitable uses: but the statute makes nothing more void; and therefore the deed, so far as it passes other lands not to a charitable use, may be good. (*u*) A devise therefore of real and personal estate to erect a school to educate the children of the testator's relations and other persons, generally is void as a permanent charity, but good as to the particular persons specified: (*v*) but if the personal bounty cannot be separated from the general object, it will be void by this statute. (*x*)

Where the provisions of the statute have been complied with, a grant, on condition that the grantee would repair a vault and tomb standing on part of the premises, and permit the same to be used as a family vault by the grantor and any of her family, has been held not within the words of the statute, which prohibit the granting to charitable uses, unless the deed be without condition or reservation for the benefit of the grantor, or any claiming under him. It was a charitable use in part, and in part not so. As far as the grantor was concerned, it was not a charitable use: but inasmuch as it was also for his family, it might be so considered. The specific object of the statute was to prevent a

(*t*) *Norton v. Sims*, Hob. 13. *Collins v. Blantern*, 2 Wils. 351. *Maleverer v. Redshaw*, 1 Mod. 35.

(*u*) *Doe d. Thompson v. Pitcher*, 6 Taunt. 359. and *Greenwood v. The*

Bishop of London, 5 Taunt. 727.

(*v*) *Blandford v. Thackwell*, 4 Bro. Ch. Ca. 394. *Doe d. Phillips v. Aldridge*, 4 T. R. 265.

(*x*) *Grievous v. Case*, 1 Ves. J. 548.

reservation under colour of a charitable use of some substantial benefit to the grantor himself: the whole object of this use was the keeping up a tomb for himself and family. (y) But as in a late case, (z) it appeared that the owner of land having, at his own expense, built a chapel, which was used for public worship, and the congregation having subscribed a sum of money for the purpose of improving and enlarging the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a pepper-corn rent during his life, and 10*l.* a year after his death; and a declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel; and that, in case public worship there should be discontinued, they would assign the premises for civil purposes: this was held a charitable use within the meaning of the statute; and the provisions of the act not having been complied with, it was held to be void: for neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration for the lease, so as to bring it within the second section of the statute. The lease in this case was executed in the common form to twelve persons of an unconditional demise, with the usual covenants and provisoes. The Court, however, held that the declaration of trust above mentioned, although executed only by some out of the several trustees, was evidence against all for the purpose for which the lease was granted; it being a general rule with respect to deeds, that where a statute makes them void as for charitable or superstitious uses, or where they are void by the common law as *contra bonos mores*, the proof of their invalidity may be collected not only from the instrument itself, but from circumstances which, though they do not appear on the face of the deed, may be taken into consideration. Mr. Justice Abbot seemed to doubt whether the use in question was a superstitious use within the stat. 23 Hen. VIII. c. 10., or a charitable use within the stat. 9 Geo. II. c. 36. It was however clearly one or the other; and if the lease fell within the provisions of either of these statutes, it was void.

(y) Doe d. Thomson v. Pitcher, 3
M. and S. 407.

(z) Doe d. Welland v. Hawthorn,
2 B. and A. 96.

The stat. 57 Geo. III. c. 99., after repealing many of the previous acts respecting grants to spiritual persons, has enacted that it shall not be lawful for any spiritual person, holding any dignity, prebend, canonry, benefice, stipendiary curacy or lectureship, to take to farm for occupation by himself by lease, grant, or otherwise for term of life or term of years, or at will, any lands exceeding in amount in the whole eighty acres, for the purpose of occupying or using the same, without the consent of the bishop of the diocese, in which such dignity, &c. shall be locally situate, specially given for that purpose; and every such permission shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person as aforesaid who shall, without such permission, take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above the quantity of eighty acres so taken to farm the sum of forty shillings, for each and every year during which he shall so farm or occupy such land contrary to the provisions of this statute, to be recovered by and to the use of the informer. By the 72d section of the same statute the term benefice is explained to mean benefices with cure of souls, and no others; and to comprehend for the purposes of the act all donatives, perpetual curacies, and parochial chapelries. And by sect. 85. it is expressly provided, that the act shall not extend to Ireland, nor does it appear that any similar enactment ever has prevailed in that country. It should, perhaps, be remarked on the effect of this statute, that leases made contrary to its provisions are not void, but voidable only on information brought; for the statute gives a penalty in proportion to the time of occupation contrary to the statute.

By the stat. 40 Geo. III. c. 88. s. 3. leasehold lands purchased by the king out of the privy purse, or which come to the king in his private capacity, are to be vested in trustees, who are to be deemed the tenants.

By the stat. 9 Geo. I. c. 7. s. 4. churchwardens and overseers of the poor as such may purchase houses for the poor, or contract for their lodging, although they have not legally a corporate capacity.

In the case (a) of a corporation aggregate, consisting of two bail-

(a) *Salter v. Grosvenor*, 8 Mod. 303.

iff and burgesse, one of the bailiffs and burgesse made a lease to the other bailiff in his natural capacity; the lease was held void, because the bailiffs are an integral part of the corporation, and make one officer; therefore, if one is severed from the other in a corporate act, the act is void. So, in a corporation of dean and chapter, the dean cannot take a lease from the chapter, because no lease can be made by the corporate body without the dean, who cannot be grantor and grantee too. So a corporation sole cannot make a lease to himself: but this must be understood of leases at law only; for there is no objection in any of the above cases to lease being made in trust for the grantor. Neither is there any objection to one joint tenant leasing his share to his companion, because he can lease it to a stranger without his concurrence, and it is in a manner a severance of the jointure. The objection arising from community of possession is of much less weight in the case of parceners and tenants in common; for the law supposes them to hold in severalty.

An assignee of a bankrupt is incapable of becoming a lessee of the bankrupt's estate: if therefore, instead of selling the estate, he takes a demise of it, he will be accountable for any profit; and he must sustain the loss, if any; for the Court of Chancery will not relieve him from the consequence of an act so derogatory to the trust reposed in him. (b) So, although generally speaking the law takes no further notice of the relation between lessor and lessee than in the manner before stated, courts of equity view with jealousy such contracts if they take place between persons whose duties towards each other are more peculiarly the subject of equitable jurisdiction: such are principal and agent, debtor and creditor, mortgagor and mortgagee.

It is incumbent on a person in the situation of an agent to show that the transaction is perfectly fair and reasonable, and that a just consideration has been given for the lease. Where, (c) therefore, A., being standing counsel and manager for B., obtained long leases from him, they were confirmed, because it was proved that the purchase money was nearly equal in value; and that A. had been serviceable to B. in his profession. On the contrary, if the

(b) *Ex parte Hughes*, 6 Ves. 617.

4 Bro. P. C. 164. by Toml.

(c) *Lord Kingdall v. Barnwell*,

agent obtain such leases at an undervalue from his principal, who reposes confidence in him, by availing himself of the inexperience, negligence, and extravagance of the principal, they will be set aside in equity, or be held securities only for the money advanced. (*d*)

The cases of *Lady Ormond v. Hatchinson*, (*e*) and *Harris v. Tremenhere*, (*f*) establish the general doctrine, that an agreement between an agent and his employer to obtain reversionary leases at an undervalue cannot be supported. Yet in the case of *Medlicott v. O'Donnell* (*g*) the Court would not set aside the reversionary lease so obtained, although at an undervalue: but in that case a variety of circumstances influenced the Court. Although the relation of debtor and creditor had existed between the parties as well as agent and principal; yet there had been an acquiescence on the part of the principal for twenty-seven years. The fiduciary character had also ceased; and the transactions had been recognized by the principal as fair upon oath.

A contract between a mortgagor and mortgagee for a lease to be granted in consideration of forbearance is clearly usurious, (*h*) if the mortgagee already receives legal interest for his money. And in one case (*i*) Lord Redesdale stated it as his opinion, that the policy of the law upon which the statutes of usury are founded forbade all such transactions between persons standing in relation of mortgagor and mortgagee, although the lease might be made at a fair value.

A lease granted to a creditor on a further loan at a stipulated rent to be retained in discharge of the debt is a security in the nature of a mortgage: but if the rent be at a fair value, it cannot be set aside. But where a second lease was granted on a further loan at the old rent, this being deemed clearly a fraud was set aside, and the creditor decreed to account for the full value from the date of it. (*j*) Length of time, however, in these cases is a bar to relief: and therefore, after an acquiescence for nineteen

(*d*) *Watt v. Grove*, 2 Scho. and Lefr. 492. *Cary v. Cary*, 2 Scho. and Lefr. 173. *Dawson v. Massey*, 1 Ball. and Beatty. 219.

(*e*) 13 Ves. 47. 16 Ves. 94.

(*f*) 15 Ves. 34.

(*g*) 1 Ball. and Beatty. 156.

(*h*) *Gubbins v. Creed*, 2 Scho. and Lefr. 218.

(*i*) *Webb v. Rorke*, 2 Scho. and Lefr. 661.

(*j*) *Morony v. O'Dea*, 1 Ball. and Beatt. 109.

years, the debtor was held to be precluded from shewing that the rent was at an undervalue. (*k*)

A beneficial lease under the influence of loans of money made, or expected to be made, are fraudulent evasions of the statutes of usury : (*l*) but it is not every pecuniary consideration of a collateral nature which is a fraudulent inducement to make a lease. Thus, where (*m*) a lease was made at a stipulated rent, and the landlord at the same time obtained from the tenant a sum of money equal to two years' rent, which was secured to the tenant by another lease of the same date for two years at a nominal rent, the interest to be paid under the first lease (*n*) or rent payable under the other lease; this was held not to be a lease in consideration of a loan, as the relation of debtor and creditor did not exist, and the tenant could not by action recover the rent. It was only an advance of rent by way of foregift or fine. The effect, however, would have been the same if such a fine had been well secured by a collateral security, (*o*) as a bond and insurance. So where A., being seised in fee of the reversion of premises which were leased to E. for years, at an annual rent agreed *bond fide* to sell the rent to B. for the residue of the term, for a sum, the principal and interest of which was to be reimbursed to B. in that time by the perception of the rent, if punctually paid : at the same time A. being induced by the accommodation offered him by B., made a lease to B. of the same premises, at the same rent which E. paid : but such rent not to commence till after the expiration of E.'s lease : this lease was held not to be impeachable as being coupled with a loan, because the first transaction was a fair purchase of the rent; and it is essential to a loan, that the principal and interest should in all events be paid; but in this case it is clear the lessor would not have been liable, if all or any of the rents had been lost. (*p*) So also where a lease was made with a clause empowering the tenant to retain the rents till a sum of money advanced by the landlord at the time of granting the lease was paid, but for which no separate security

(*k*) *Morony v. O'Dea*, *supra*, *Hickes v. Cooke*, 4 Dow. P. C. 16.

(*l*) *Drew v. Power*, 1 Scho. & Lef. 182.

(*m*) *Wilton v. Browne*, 1 Ball. & Beatt. 125.

(*n*) Gale, from *gavel*, a rent or duty. Spelm. Voc. Gabellum.

(*o*) *Obrien v. Grierson*, 2 Ball. & Beatt. 323.

(*p*) *Lukey v. O'Donnell*, 2 Scho. & Lef. 446.

was given, and the advances bore no interest, this was not such a loan as to avoid the lease. (q)

Where a tenant for life, with the usual power of leasing power, exercised his power by leasing to a person who accommodated him with a loan, the lease was set aside: but an under-lessee *bona fide*, and not concerned in the loan, was not disturbed. (r) So where (s) A. holding certain premises under a lease made in 1769, for three lives, at 300*l.* rent, obtained in 1802 from B. tenant for life, with leasing power, then under age and in embarrassed circumstances, a new lease of the lands at the old rent, substituting instead of the two old lives two young ones, by the offer of an immediate payment of a year's rent then due, but by the custom of the country, not payable till half a year after, and also by a promise to plant ten thousand trees for the benefit of the landlord, and also to make over to him these already planted, although the House of Lords declared the lease void as between lessor and lessee, yet they remitted the case to the Court below to proceed with respect to relief to the widow of the lessee, by whose marriage settlement the new lease was settled as a security for her provision. The lease in this case contained nothing about the trees planted, and no covenant to plant ten thousand others: but an agreement was indorsed to plant them. The old lease was retained by A., and no trees were planted by him. B., after he came of age, accepted the rent, and gave receipts for it. Lord Eldon observed, that he did not rest much on these acts of confirmation. If the old lease had been delivered up, those acts would have been more material. He recommended that the new lease, as between the lessor and lessee, should be cancelled without prejudice to the old.

A bill in equity will not lie at the suit of the remainderman to set aside a lease by tenant for life, with a power of leasing, on the ground of its having been accompanied with a loan; for there is no privity between tenant for life and remainderman: the remedy, if any, is at law, in case the power has not been properly executed. (t)

(q) *Prior v. Dumphy*, 1 Ball. & Beatt. 27. *King v. Drury*, 2 Lev. 7. *Steed v. Cragh*, 9 Mod. 43.

(s) *Knatchbull v. Kismac*, 5 Dew. P. C. 389.

(t) *Corbet v. Scagrave*, 2 Ball. &

(r) *Molloy v. Irwine*, 1 Scho. & Lef. Beatt. 98. 310.

General cases of fraud would lead us into far too large a field of inquiry for our present purpose : it will be sufficient to say, that fraud forms an extensive head of equitable jurisdiction. If the consideration be fraudulent, or *contra bonos mores*, or any other circumstance, affect the transaction with fraud, the lease may be set aside in equity, although in many cases courts of law have rendered such an interference unnecessary. A marriage brokerage agreement, for example, is a fraudulent consideration: (u) Where, (x) however, a bill having been brought to set aside a lease made by collusion between the lessee and the steward of the lessor, at an inadequate price, the bill was amended; and the amended bill prayed that the defendant should be decreed to keep the lease, and pay the full price : it was decreed accordingly, with interest, at 4 per cent. on the residue, from the signing of the lease; but credit to be given for the money originally paid.

Where a lease of lands in Ireland was made after the lessor's estate had been put under sequestration for a contempt to the court of exchequer, the lease was notwithstanding held good, because the lessee had no notice of the sequestration : (y) so, on the other hand, a lease by an administrator was set aside, where the lessee had notice that a sale was required by the parties beneficially interested; for the personal representative is bound to sell if the next of kin call upon him to do so: (z)

A court of equity will pay no regard to a lease obtained *pendente lite* as against the successful party: but it will not, on the motion of a creditor coming in under a decree directing a sale of lands for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will, with a leasing power. (a)

Renewed and renewable leases afford also frequently an occasion for equitable interference. Although at law a renewed lease is the demise of an interest unconnected with the prior lease, and the lessor may choose another tenant without reference to the old contract, yet it has been determined in equity, that if a trustee,

(u) *Scribblehill v. Brett*, 4 Bro. P.C. 145. by Toml. & Fonbl. T. Eq. on Marriage, Bro. Agreements.

(x) *Lord Abingdon v. Butler*, 1 Ves. jun. 206.

(y) *Vicars v. Colclough*, 5 Bro. P. C. 31. by Toml.

(z) *Drohan v. Drohan*, 1 Ball. & Beatt. 185. See also *Macloed v. Drummond*, 17 Ves. 152.

(a) *Falkener v. O'Brien*, 3 Ball. & Beatt. 225. *Moore v. Macnamara*, 2 Ball. & Beatt. 186.

executor or guardian obtains a renewal for his own benefit, the Court will direct it to be for the use of the *cestui que trust*, or other persons beneficially interested. So where a person, jointly interested with an infant, obtains a renewal, if it prove beneficial, he shall be held to have acted as trustee for the infant : but if it prove otherwise, he shall bear the whole loss. (b) So if one partner treats privately for the premises where the joint trade is carried on for his own individual benefit, and obtains a renewal in his own name, it shall be in trust for the partnership ; for the lease is no more than a stock in trade, (c) and as part of the stock it may be sold : neither is it material whether it is for life or years, if intended only as an article of stock ; though a question might arise in the case of freehold leases, whether it would pass as real or personal estate on the death of a partner, being personal in enjoyment, though freehold in quality. (d) So also such renewed leases are liable to other charges, such as annuities, if the leases are renewed in the right of the person granting them ; and even where the lease was renewed by a person not bound in the same way as the grantor, yet after renewal the equity was held to attach on the new lease for the benefit of the annuitant. The grantor of the annuity was a feme sole, who afterwards married, and died : her husband, as administrator, renewed ; and although, after the coverture, he was not bound by his wife's covenants, yet since the lease was renewed, it was considered the same as the original lease, to protect the charges created previous to the renewal. In this case the husband had full notice : but it was held that notice was immaterial, because the husband did not take as a purchaser for valuable consideration, but by force of his marital right. (e)

Tenant-right of renewal is neither a certain, nor a contingent interest in law ; because it depends on the will of the lessor, whether he will renew or not : but in the case of leases from the crown, ecclesiastical corporations, or others, where the

(b) *Ex parte Grace*, 1 Bos. & Pull. 376. *Kellick v. Flexney*, 4 Bro. Ch. Ca. 161. See 1 Scho. & Lef. 209.

(c) *Featherstonehaugh v. Fenwick*, 17 Ves. 302.

(d) *Thornton v. Dixon*, 3 Bro. Ch. Ca. 199. *Smith v. Smith*, 5 Ves. 189. *Ripley v. Waterworth*, 7 Ves. 425.

Bell v. Phyn, 7 Ves. 453. *Balmain v. Shore*, 9 Ves. 500. *Stuart v. The Marquis of Bute*, 11 Ves. 665. *Selkrigg v. Davies*, 2 Dow. P. C. 240. *Townsend v. Devaynes*, 1 Mont. on Partn. 97.

Crawshay v. Maule, 1 Swanst. 495.

(e) *Moody v. Mathews*, 7 Ves. 174.

tenure is of ancient date; and where, if the tenant is willing to pay the fine demanded, there is no probability of his being removed, the tenant-right of renewal is so far considered, that it influences the price of such leasehold property in sales, and makes it a proper object of mortgages and settlements; and in equity the renewed lease will be taken to be the original lease, on the supposition of its renewable nature. (*f*) There is no further connection, however, between the lessor and lessee, than in ordinary tenancies. It has been held accordingly, that a tenant holding a renewable lease under a dean and chapter has no right to inspect the books of the lessor, because they are of private right, and they are not like the books and rolls of a manor which the lord holds as trustee for the copyholder, of whose title such books are the only evidence. (*g*)

Leases of this kind are frequently limited in a manner similar to the limitations of estates of inheritance on settlements and wills; and if a person, having a partial interest only as tenant for life, mortgagor or mortgagee from the circumstance of his being in possession takes the opportunity of renewing, such renewal will be for the benefit of him in the reversion. (*h*) Where, however, the mortgagor in possession forfeited the old lease, a new lease to the mortgagee was held not to be grafted on the old for the benefit of the lessee, because he was neither in possession, nor could he be said to procure the new lease behind the back of the lessee. (*i*)

A reversionary lease obtained under the circumstances above mentioned is within the same equity; and it has been therefore determined, that neither the party obtaining it, nor a purchaser from him, with notice, shall hold to their own use. (*k*)

Where persons moreover, who have had no connection with the original lease, have used undue means to conceal the tenant-right, or to make it ineffectual, and have either obtained renewed or

- (*f*) *Palmer v. Young*, 1 Vern. 276. 347. *Eyre v. Dolphin*, 2 Ball. & Lee v. Vernon, 7 Bro. P. C. 438. Beatt. 290. *Rakestraw v. Brewer*, 2 Rawe v. Chichester, Amb. 719. Col- P. Wms. 511.
let v. Hooper, 13 Ves. 258. (*g*) *Nesbitt v. Tredennick*, 1 Ball. & Beatt. 29.
(*g*) *Ord d. Lynch v. Stubbs*, Andr. 247. (*k*) *Parker v. Brook*, 9 Ves. 583.
(*h*) *Hardman v. Johnson*, 3 Meriv. Taster v. Marriott, Amb. 668.

reversionary leases, they have been considered trustees for the old uses. (*l*)

Where trustees have a discretionary power to renew, they have no option to renew or not : but they must do so for the benefit of the *cestui que trust*. (*m*) So where such estates are limited in settlements or mortgaged, it is incumbent on the person in possession to renew for the benefit of those in remainder, or of the mortgagee. But here a collateral question of some importance arises with respect to the fines payable on such renewals.

In mortgages, if the mortgagor in possession neglect or refuse to renew, the mortgagee may effect a renewal ; and the fine and expenses of the renewal will be charged on the premises, and bear interest. (*n*)

The bequest of an annuity charged on the testator's leasehold interest during the term of the said lease extends to, and is charged upon every renewal obtained by the devisee of the leasehold interest, and the annuitant must contribute to renewal fines in proportion to his interest : (*o*) but if an annuity has been granted in the way of security for the loan of money, it has been held that a life annuitant is not bound to contribute. (*p*)

If a fine be paid for the renewal of a lease by one of two joint tenants, he has a lien on the other moiety, though under settlement. (*q*) So in the case of a leasehold estate for lives, where it was settled on the husband for life, and he renewed by putting in the life of the wife, he was held to be a creditor on the estate for the fine and charges of renewal.

In marriagesettlements there is usually a provision for the payment of the renewal fines out of the rents and profits to be received by the trustees. If they neglect to renew, they are answerable for a breach of trust : but the assets of tenant for life, or other person taking the beneficial interest, will be first applied to indemnifying

(*l*) Butler's note, Co. Litt. 290. b. l. XI.

(*m*) Lord Milsington v. Lord Mulgrave, 3 Madd. Ch. Ca. 491. Lord Milsington v. Lord Portmore, 5 Madd. Ch. Ca. 471.

(*n*) Lucken v. Rushworth, Finch. 392. Lacam v. Mertins, 1 Wils. 34.

Rushworth's case, 2 Freem. 13.

(*o*) Winslow v. Tighe, 2 Ball. & Beatt. 195.

(*p*) Maxwell v. Ashe, 1 Bro. Ch. Ca. 444. n.

(*q*) Hamilton v. Deany, 1 Ball. & Beatt. 199.

the trustees from the expense of renewal where they have neglected to provide the requisite fund. (r) Where, therefore, there were several tenants for life, and the lease was renewable every fourteen years, and two periods elapsed in the lifetime of the tenants for life without renewal by the trustees, the tenants for life were declared liable to the extent they would actually have suffered a diminution of rent, if the rents had been properly applied. In this case one of the tenants for life had assigned his interest: the lord chancellor said that the trustees could have no claim on the assignee; but the remainderman might in case of all other funds being found insufficient.

Where there are no trustees, if the tenant for life renews, those in remainder will be called upon to contribute in proportion to the interest they take in the renewed lease. Before the case of *Nightingale v. Lawson*, (s) the rule of the Court was, that the tenant for life should contribute to the renewal in every case, except where a devise was made of leases renewable for lives; and the devisee was one of the *cestui que vies*. (t) The proportion adopted was one-third, to be paid by the tenant for life, and the remaining two-thirds to be a charge upon the inheritance. In *Nightingale v. Lawson*, Lord Thurlow said, that where there is no custom or direction by will to renew, it is in the discretion of tenant for life to renew or not: but if he renews, the law will not permit him to renew for his own benefit only; but will make him a trustee for the remainderman. Then upon what terms is the remainderman entitled to it? As to the idea that it is to be upon the payment of two-thirds, or any other proportion, that cannot be the rule; for if there were twenty or thirty years of the existing lease to run, it cannot be thought for the benefit of tenant for life to renew. In the principal case the tenant for life, when there were twelve years to come, renewed for twenty-eight: she enjoyed it for nine years after the twelve were expired, leaving nineteen years. The master, he said, ought therefore to charge the remainderman with those nineteen years, with compound interest, at 4 *per cent. per annum*, on the advance made by the tenant for life, till the time of her death; after which it be-

(r) *Lord Montford v. Lord Cadogan*,
17 Ves. 485. 2 Meriv. 3.

(p) 1 Bro. Ch. Ca. 440.

(s) *Adderley v. Clavering*, 2 Bro.
Ch. Ca. 659. *White v. White*, 4 Ves.

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comes a demand of her executors, and is in the nature of a common debt bearing simple interest.

The point seems to have been finally settled by Lord Eldon. (u) His lordship observed that, from a note of his own, the opinion of Lord Kenyon when at the bar was, that there never had been a case in the court in which where the court had no other fund to deal with than that constituted by the interest of the remainderman, in such leasehold property the rule of two thirds and one was ever applied. Each case must be decided according to its own circumstances: for in the case of an infant what would the court direct to be paid, where the infant might or might not take an actual interest? Lord Kenyon's opinion was, that at the death of the tenant for life who renewed, it should be seen what was the increased value of the estate purchased by him: then the payment made by anticipation should be considered; and, upon the principle of compound interest, the value of that increased interest purchased by the tenant for life should be charged on the remainderman. If the remainderman advanced the money, the calculation should be made the other way. It must also be remembered that the lessor may refuse to renew, and the lease may run out. It may be under such circumstances that the interest the remainderman takes may be nothing more than the opportunity the lease renewed *in presenti* has secured to apply at the end of the term for another renewal, in which the remainderman may take an actual interest. There is no difference between leases renewable for years, and those renewable for lives; except the difficulty in the latter case of estimating the life which may survive out of the *cestui que vie*, and consequently the interest of the remainderman.

In the case of *Buckeridge v. Ingram*, (x) Lord Alvanley thought that the tenant for life had only to keep down the interest: but Lord Eldon dissented from this doctrine, because the tenant for life might enjoy nine-tenths of the benefit purchased by the principal money. And he drew a distinction between this case, and that of a mortgage debt: for, in the case of tenant for life of the equity of redemption, there was a permanent *corpus* or interest; but in renewable leases for lives or years, the interest was temporary,

(u) *White v. White*, 9 Ves. 556. (x) 2 Ves. J. 666. *Verney v. Verney*, *Allan v. Backhouse*, 1 Ves. and B. 65. 1 Vez. 429.

and might cease by the lessor's refusal to renew : therefore that position, that tenant for life is bound to pay the interest only, must be understood with this correction, that he is further liable to be charged with a due proportion of the benefit he takes in the estate.

In the case of *Lord Montfort v. Lord Cadogan*, (y) the master of the rolls in the first instance thought that the assets of the tenants for life should be liable in proportion to the time of their enjoyment ; but, on appeal to the lord chancellor, the decree was varied as to this point. If the trustees, it was said, had done their duty, the second tenant for life would have had a lease for fourteen years, and a sufficient fund for a new renewal. To that extent the estate of the first tenant for life was chargeable, and the estate of the next tenant for life would be only chargeable to the amount necessary to be reserved out of the rents for the next renewal.

By the stat. 29 Geo. II. c. 31. (z) where infants, lunatics, and *femes-covert*, are beneficially interested in the tenant right of renewal, the courts of equity in England and Wales, upon a summary application to them, by petition or motion in a summary way, may direct the surrender of existing leases for the purpose of renewals ; the fines and charges in the case of infants and lunatics to be paid out of their estates, and in the case of *femes-covert* to be charged on the premises. By the third section it is enacted that the renewed leases shall be to the former uses. (a)

An executor, trustee, or guardian, cannot alter the nature of renewable leases ; therefore, where such leases had been usually renewed for years determinable on lives, and the executor at the request of the landlord renewed for lives for the benefit of an infant, it was held that it would go to the executor of the infant, and not to his heir. (b)

In conclusion, no instrument to which the lessee is not a party is strictly speaking a lease, because the benefits and engagements being mutual, the instrument creating them should be obligatory on both parties. Therefore an agreement between A. and B., that C. shall have the land is no lease, but merely an agreement

(y) 17 Ves. 485. 2 Meriv. Ch. Ca. 3.
19 Ves. 685.

(z) Qu. Irish Statute.

(a) *Ex parte Swann*, 2 Dick. 749.

(b) *Witter v. Witter*, 3 P. Wms. 102.

between strangers. (c) So in another case, (d) where one made a lease for life; *et provisum est* that if the lessee died within sixty years, then his executors and assigns should enjoy the land in his right for so many years as should remain of the sixty years from the date of the lease, one of the reasons given by Moore why this proviso was not considered a lease was because the executors were not parties to the deed. So also where a lease was made by indenture to trustees for forty years, if the lessor so long lived, and after the death of the lessor one moiety of the land was granted to A. for 1000 years, and the other moiety to B. for a similar term, who were neither of them parties to the deed: it is reported that the court objected, and doubted whether the remainder to A. and B. was not void, because they said it could not pass to them by way of a present interest, because they were not parties to the deed. (e) It is true that the interest could not pass a present estate on account of the reason stated: and it was contended that it could not be a contingent estate for years, because a lease for years operates by way of contract; and therefore the particular estate and the remainder for years might be considered as two distinct estates, grounded upon two several contracts. According to this opinion the lease in remainder seems to have been considered a present disposition of the land, though to commence *in futuro*; and consequently to have required a grantee *in præsenti* capable of taking the interest granted as an *interesse termini*. But this opinion is not now received as sound law, and the judgment in the case cited may be accounted for on other grounds. (f) On the contrary it is now settled that, although persons not parties cannot take any present interest, terms for years by way of remainder may be limited to them; and when such remainders come into possession, those who take the benefit of them will be liable to all the obligations of lessees. (f)

In 3 Leon. 32. an anonymous case is reported, in which it was determined, that where a lease is made for years, if the lessee should so long live; and afterwards a second lease for years is made to the same lessee, *habendum* to his executors after the first lease ended: this second lease must be considered void, because

(c) Perry v. Allen, Cro. Eliz. 173.
 Littleton v. Perne, 1 Leon. 136. Cole
 v. Friendship, 1 Leon. 287. Brewer v.
 Hill, 2 Anstr. 413.

(d) Parker v. Gravenor, Moor. 490.
 (e) Corbet v. Stone, Tho. Raym. 140.
 (f) Wrightd. Plowden v. Cartwright,
 1 Burr. 282.

the executors can take no present interest as lessees, since they cannot be in *rerum natura*, much less parties to the lease. But in another case, (g) where a lease was made for 80 years if the lessee should so long live, remainder for years to his executors and assigns; this remainder was held good because it vested in A., and the whole made one demise. There was a case however previous to this which seems at variance with it, and was cited at the time, namely, Archbishop Cranmer's case. (h) Henry VIII. granted a lease for years; and the reversion descended to Edward the Sixth, who granted it to Cranmer. Cranmer enfeoffed two persons to the use of himself for life, remainder for 20 years to the use of his executors. Upon the attainder of the archbishop, it was held that the remainder for years was not forfeited, because it was never vested in Cranmer in his lifetime. The case of *Sparke v. Sparke* (i) is reported in several places: but in Cro. Eliz. 666. Walmsley J. attempted to reconcile the two cases. The difference between them, he says, was, that in Cranmer's case it was limited by way of use, and that by the party himself; so he shews himself his own intent, that it should not vest in himself, but in his executors: but in the other case the limitation was by a stranger wherein no intention appears, but that it should vest in the lessee himself. This distinction seems to be supported by two other cases, both of which are reported in Moore. The first is *Finch v. Finch*. (k) The case on special verdict appeared to be the following: feme-sole levied a fine to the use of herself for life, and after her death to the use of her executors for five years with remainder over; and then she married, and with her husband granted the term of five years to the plaintiff, and then she and her husband levied a fine *sur comusance de droit tantum*. The first question was, whether the use to the executors was good; and the court agreed unanimously in the affirmative; and that if the possession were not disturbed it would arise accordingly: the second question was, whether the feme could grant it during her life, and they held not; and they further held, that it could not be forfeited. In the next place, they agreed that it might be extinguished by fine, and therefore

(g) *Sparke v. Sparke*, Owen. 125.(i) *Supra*.

Moor. 666. Cro. Eliz. 666. 841.

(k) Moor. 339. *Finch v. Bodyll*, S. C.

(h) Cranmer's case, Dy. 309. Moor. 2 And. 91.

that the fine *sur consuance de droit tantum* had extinguished it. The other case is *Remington v. Savage*. (l) J. S. levied a fine to the use of himself for life, remainder to his wife for life, remainder to his executors for years; and then he levied a second fine to the same uses omitting the estate for years: it was held that the term being in abeyance was extinguished.

Where, however, one person pays the consideration, and the lease is executed to another, this last, as in the case of all purchasers, is in equity a trustee for the first, who shall have all the benefit, although his name is not mentioned. This rule has been settled ever since the decision in 2 Ventr. 361. (m) and is an exception from that provision of the statute of frauds, which requires all trusts to be declared in writing. So there is a resulting trust, where there has been a joint advance upon a purchase made by one. (n) So also where (o) a trader advanced half the money for the renewal of a lease, the lessee giving a note to repay the money, unless she should by will give the estate to one of the trader's children, and the lessee bequeathed the lease to his daughter, it was held that the father having become bankrupt a moiety would vest in his assignees under the stat. 1 James I. c. 15. A third person taking with notice from a nominal purchaser is also a trustee for him who paid the money. (p)

The same principle is recognised in *Crop v. Norton*: (q) but in that case there was an express declaration of trust by one of the parties, which was held to preclude any implied trust by operation of law. The case may be stated thus: father, son, and grandson. The father being the last life in a bishop's lease, agreed with the son to surrender the lease on a promise of the bishop to grant a new one for three lives, namely, the lives of the father, son, and grandson; and, in consideration of the father's surrendering the old lease, it was agreed that the new lease should be in trust for the grandson. The whole purchase money or fine was paid by the son: but the legal estate on the new lease was granted to the father and his heirs for his own life, and the lives of the son and

(l) Moor. 745.

Hall v. Digby, 4 Bro. P. C. 224.

(m) Anon. 2 Ventr. 361.

(o) Fryer v. Flood, 1 Bro. Ch. Ca.

(n) Wray v. Steel, 2 Ves. and B.

160.

388. Gascoyne v. Thuring, 1 Vern.

(p) Mackreth v. Symmons, 15 Ves.

366. Dyer v. Dyer, Watk. Copyh.

329.

216. Lake v. Cradock, 3 P. Wms. 158.

(q) 2 Atk. 74.

grandson. The father, the very next day after the making of the new lease, made a deed-poll, by which he declared that his intention was that the father and son and heirs should have the estate for the remainder of the term. It was insisted upon for the son, that having paid the whole fine, there was a resulting trust in his favour to dispose of the whole interest. Lord Hardwicke said, that, admitting the son had not the legal estate, his equitable right depended on two considerations: 1. The circumstances of the transaction between the father and son relating to the renewal of the lease; and, 2. the deed poll. 1. The father had the sole interest in the old estate; and though he had only one life, yet he had the right of renewal as against the son: the whole consideration therefore did not proceed from the son; for a material consideration was the consent of the father to surrender the old lease. Next as to the deed poll, which was executed the day after the lease: it was a plain declaration of trust by the person having the legal estate, who, therefore, had the right to do it, and was the only person from whom it could move. But then it was said, it was very hard that the father should have the power of giving away the whole beneficial interest from the son, who paid the whole fine: but Lord Hardwicke said, that when writings were executed so near each other, it was natural to think they were all in pursuance of one transaction and agreement between the parties. If the last life had been the life of a stranger, it might have been a hardship: but as the grandson's life was the last life, it was rather a benefit; for the father parted with a valuable interest in order that the son might purchase an advantage for the grandson. Lord Hardwicke therefore said, he must determine upon an express declaration of trust by the father, who had the legal estate and a valuable share in the consideration of the new lease at the time it was purchased, and consequently the only person who had a right to declare the trust; and there could be no pretence for an implied trust by operation of law.

There can be no implied trust between the lessor and lessee, because every lessee is a purchaser by his contracts and covenants, which exclude the possibility of implying trusts. (r) The trust, therefore, must be expressly declared; and it must be in writing

(r) *Pilkington v. Bayley*, 7 Bro. P. C. 383. by Toml.

according to the statute of frauds. In one case, (s) indeed, though it was admitted that there could be no parol declaration of trust; yet, since there was upon the face of the deed an intended trust, the Lord Chancellor admitted parol evidence to explain the circumstances: but that was on the principle of avoiding fraud; for the evident design in that case was to deprive the plaintiff of the enjoyment of his estate.

(s) *Hutchins v. Lee*, 1 Atk. 447.

CHAPTER II.

ON AGREEMENTS.

ON the subject of contracts, it is necessary to define what are considered executed agreements, and what are executory only. Leases are not, strictly speaking, executed agreements; because the engagements of the lessee at least are prospective and executory only: with reference, however, to the instrument or the estate granted by the lessor, a lease may be called an executed agreement in contradistinction to a promise or covenant by the lessor to make or execute a lease which is usually called an agreement to make a lease. In point of form there is no difference between them: for whatever is sufficient to shew the intention of the parties, that the one shall divest himself of the possession, and the other enjoy it for a reasonable time, in writing or by parol, amounts to a lease. On the other hand, if upon the whole there appears to be an intention to make a more perfect lease at a future time, the instrument will be executory only, although words competent to pass a present interest are used. (a) Agreements therefore, more commonly so called, are executory: they may be made by parol, or in writing; and those in writing may be either by deed when they are called covenants, or simply in writing.

Agreements for leases, which are not to be performed within one year from the making, are within the fourth section of the statute of frauds, which enacts that no action shall be brought on any such agreement, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith, or some other person thereunto by him lawfully authorized. Since all leases may be called

(a) *Moor v. Williams*, 1 And. 134. *gory v. Mayo*, 2 Lev. 194.
Baldwin v. Marton, 1 And. 223. Gre-

executory agreements, this section of the statute comprehends most of the cases of agreements for leases. Therefore, where (b) there was a parol agreement to occupy lodgings at a yearly rent, payable in quarterly portions, the occupations to commence *in futuro*; Lord Ellenborough, C. J., thought the agreement void under the fourth section of the statute of frauds, because it was not to be executed within the year: although, as we shall have occasion to observe hereafter, such a lease was within the limit of time for parol leases, by a previous section of the statute of frauds; (c) and consequently no further act would have been necessary, if the lessee had entered, to make it a valid parol lease. (d)

With respect to the signing required by the statute, it has been determined that a signing of any contract for leasing by a corporation, consisting of the master and fellows of a college, except under the common seal, is not binding on the college in a corporate capacity. (e) If however the agreement is under the corporate seal, the circumstance of the body being incomplete is not material; and if by any accident the lease is delayed, and a fresh member is added, such new member will be bound as one of the body, as he will also be entitled to a share of the usual fine. (f) The mere circumstance of the name of the party being written in the body of a memorandum of an agreement, with reference to a particular purpose, will not constitute a signature within the meaning of the statute. (g) The Court of Exchequer in the case cited were unanimously of opinion that the signature required by the statute is to have the effect of giving authenticity to the whole instrument; and, where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is found, as in the formal introduction of a will; but they said it could not be imagined that a name inserted in the body of an instrument, and applicable to particular purposes, will amount to such an authentication as the statute requires. The question in the case was, whether instructions for the renewal of a lease written by the defendant (in which, among other things, he stated

(b) *Inman v. Stamp*, 1 Stark. N. P. 851. Bull. N. P. 171. C. 12.

(c) Stat. 29 Ch. II. c. 3. s. 2.

(d) But see *Rawlins v. Turner*, N. P.

1 Lord Raym. 736. Anon. 12 Mod. 610. *Ryley v. Hicks*, N. P. 1 Str.

(e) *Taylor v. Dulwich College*, 1 P. Wms. 655.

(f) *Wynne v. Bampton*, 3 Atk. 473.

(g) *Stokes v. Moor*, 1 Cox. Rep.

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what rent was to be paid himself by name) could be considered a note or memorandum of agreement signed by the defendant; and the Court of Exchequer decided it was not. It has been held, however, that a writing, purporting to be an agreement between the plaintiff and A. B. the defendant, for the sale of certain premises beginning thus:—"I, A. B., agree to sell, &c." is a writing sufficiently signed to charge the defendant, though he has not signed at the bottom of the paper. (*h*) This writing was attested: but the point is not free from doubt. (*i*)

The statute expressly requires a signing; therefore, it is not sufficient to shew that the draft of the agreement was read over to the defendant by his desire, (*k*) or that it was reduced into writing by a person present at the making the agreement, (*l*) or even that the defendant perused and altered the draft. (*m*)

But where an agreement has been reduced into writing, but not signed, and letters have passed between the parties referring to the agreement, this has been held to satisfy the statute. This doctrine has been thus stated by Lord Eldon: (*n*) though the agreement is not signed, yet, if the letter contains all the terms, and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter which not only is not a signature, but is the last of all things which can be called signing an agreement, is a writing signed, which ascertaining the contents of an agreement, amounts to a note or memorandum of it; and, therefore, satisfies the statute: but it must appear, from a fair interpretation of the letters, that they import a concluded agreement. (*o*) In *Ogilvie v. Foljambe*, (*p*) a contract was enforced arising on notes written in the usual style. "Mr. O. has the pleasure to acquaint Mr. F.," and "Mr. F. presents his compliments to Mr. O."

(A) *Knight v. Crookford*, 1 Esp. N. R. 252.

P. C. 189. See *Saunderson v. Jackson*, 2 B. & P. 238.

(f) See 9 Ves. 250.

(k) *Cooper v. Smith*, 15 East. 103. *Wright v. Damiah*, 2 Campb. 203. *Teal v. Auty*, 2 Brod. & Bing. 99.

(l) *Gunter v. Halsey*, Amb. 586. *Whitchurch v. Bevis*, 2 Bro. Ch. Ca. 559. *Champion v. Plummer*, 1 N.

(m) *Hawkins v. Holmes*, 1 P. Wms. 770. *Shippey v. Derrison*, 5 Esp. N. P. C. 190.

(n) *Coles v. Trecothick*, 9 Ves. 250. *Huddleston v. Briscoe*, 11 Ves. 583. 591. *Brooke v. Hewitt*, 3 Ves. 253.

(o) More on this point post. See *Stratford v. Bosworth*, 2 V. & B. 341.

(p) 3 Meriv. 53.

Where there was a *parol* agreement, and a draft was prepared, and an indorsement was made on the draft, admitting the agreement, it was held at *nisi prius* sufficient to take the case out of the statute. (*q*)

An agent, to contract under this section of the statute of frauds, need not be authorised in writing: (*r*) but the bare entry of a steward in his lord's contract book with his tenants is not evidence of itself, that there is an agreement between the landlord and the tenant. (*s*) The signature of an agent's name by an auctioneer is sufficient signing by the statute, the auctioneer being an agent lawfully authorised. (*t*) The agent must be a third person, for one of the parties cannot be the authorised agent of the other. (*u*)

In a late case (*x*) before Lord Eldon, the distinction between a general and special agent, as to their powers of binding the principal, was much considered. The agreement had been signed by the defendant's solicitor in his absence; the authority was denied, and the defendant's solicitor deposed that, at the time of the execution, he stated that he had no authority. On this evidence Lord Eldon observed, that it was to be received with jealousy, and with due attention to circumstances: but, his lordship continued, whether a man be a general or special agent, and admitting the difference of principle governing the question, how much further one can bind the principal than the other, it is impossible, supposing that a special agent can bind beyond his authority, to contend that if he made at the time a special declaration, that he had no authority, the principal can be bound. So in the case of a general agent as an auctioneer, he may at the auction state what the limitations imposed upon his general powers of agency are: but that declaration must be of such a nature as to affect the person to be affected by it, as he would be affected under the general authority.

(*q*) *Shippey v. Derrison*, 5 Esp. N. 497.
P. C. 190.

(*r*) *Barry v. Lord Barrymore*, cited 1 Sch. & Lef. 28. See 10 Ves. 311.
Waller v. Hendon, 5 Vin. Abr. 524. pl. 45.

(*s*) *Charlwood v. The Duke of Bed-*

ford, 1 Atk. 497.
(*t*) *Kemeys v. Proctor*, 1 Jac. and Walk. Rep. in Ch. 350.

(*u*) *Wright v. Dannah*, 2 Campb. 203.

(*x*) *Howard v. Brathwaite*, 1 Ves. & B. 202.

In a late case, (*y*) where a memorandum in writing was entered in the book of A.'s authorised agent, not by the agent, but by his clerk, although it was in evidence that the agent had approved of it, and it was according to the usual course of business; it was held not to be a signing by an authorised agent of the lessor. Sir W. Grant said, that in this case it was rather difficult to say there was even a parol agreement by an authorised agent. For the evidence was, that Noble the clerk, by the direction and with the privity of the agent, made a parol agreement with the plaintiff. This seems rather a delegation of the agent's authority, than the personal exercise of it. He does not appear to have had any communication with the plaintiff. He does not say, I ratify the terms agreed upon by my clerk, but I authorise the clerk to make the agreement.

The "action" mentioned in the statute extends to suits in equity as well as actions at law: therefore, agreements which are sought to be specifically enforced in equity, must, with some few exceptions arising from extraneous circumstances, be conformable to the regulations of this section of the statute of frauds.

If an agreement is in writing, no parol evidence can be given of its contents. Where, however, a memorandum only of an agreement was drawn up, and it was agreed that the tenant should at a future day sign it, although the terms were read over and assented to by him; yet since no further act was done, this memorandum was not considered an agreement; therefore, the terms of the letting might be proved by parol notwithstanding. (*z*)

An agreement in writing, in order to be given in evidence, should also be regularly stamped: (*a*) but if it has been destroyed while unstamped, even by the wrongful act of the party making the objection, parol evidence cannot be given of its contents, for *non constat* that the commissioners of stamps in the exercise of their discretion would have permitted the agreement, if in existence, to be stamped on payment of a penalty. (*b*) Such a paper, however, if in existence, may be given in evidence if not objected to, though unstamped, at the risk of the penalty. (*c*)

(*y*) *Blore v. Sutton*, 3 Meriv. 237.

(*z*) *Reppiner v. Wright*, 3 B. and A.

(*a*) *Decd. Bingham v. Cartwright*, 478.

3 B. and A. 326.

(*c*) *R. v. Pearce, Peake*, N. P. C. 75.

(*a*) Stat. 55 Geo. III. c. 184.

A written paper delivered by an auctioneer to a bidder, to whom lands were let by auction containing the description of the lands, the term for which they were let to the bidder, and the rent payable, is not such a minute of agreement as requires a stamp, unless signed by some of the parties or by the auctioneer: nor is it such a writing as will exclude parol evidence. (d)

The stat. 55 Geo. III. c. 184. (e) enacts that every agreement, minute or memorandum of agreement, (not particularly exempted) that is made in England, and the act for Ireland makes a similar enactment for that country, is liable to a stamp in proportion to the number of words contained, when the subject matter is of the value of 20*l.* or upwards. But by the stat. 55 Geo. III. a memorandum or agreement for granting a lease or tack at rack rent, of any land or tenement under the yearly rent of five pounds is excepted. It has been determined, however, that an agreement for a lease of premises, though under five pounds, is not within such an exception, if the interest agreed upon be beneficial, as for instance a building lease. (f)

With respect to actions at law, the following general observations as to the remedy for breaches of agreements and covenants may be useful. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment of the money; and the party who is to pay shall not be compelled to part with his money till the thing is performed. This general rule is stated in the first volume of Tidd's Practice, where a numerous list of cases is referred to. (g) It is scarcely necessary to make the application to our present subject, by stating it to be a consequence of this rule, that if the lessor agrees to grant a lease without reference to any particular time, in consideration of which the lessee agrees to pay a fine or fore gift, the lessor can bring no action for his money without having made a conveyance, or tendered a conveyance. (h) If a day be appointed for the payment of money, and the day happen before the thing can be performed, an action may be brought for the money before

(d) *Ramsbottom v. Tunbridge*, 3 M. and S. 484. *Ingram v. Lea*, 3 Campb. 521. *Ramsbottom v. Mortley*, 2 M. and S. 445.

(e) Irish Act, 56 Geo. III. c. 56.

(f) *Doe d. Hunter v. Boulcott*, 2 Esp. 596.

(g) See 1 Tidd. Pr. 442. 2d edit. and see 1 Vin. Abr. 258.

(h) See 5 Vin. Abr. 80. pl. 40.

the thing is done; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. (*i*) So if a certain day be fixed as in the last case, and the thing to be done may not necessarily happen till after that day, the performance of the thing is not a condition precedent. (*k*) But where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case the performance is a condition precedent, and must be averred in an action for the money. (*l*) In the case last cited (*m*) A. covenanted that he would, on or before a certain day, convey to B. by such conveyances as B.'s counsel should advise, all, &c. in consideration of which B. covenanted to pay a certain sum of money, and reserve certain rents to A., and to lay out a certain sum on the premises. Afterwards B. accepted a conveyance of ground rents, in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by A.; and it was contended that this substitution of a different agreement by a parol was a waiver of the condition by the covenantor. Lord Kenyon however observed, that this parol agreement might be sufficient to found an action of assumpsit:—but how, said his lordship, can it be the foundation of an action upon a covenant under seal, whereby the parties have bound themselves to perform a different contract. Lawrence J. All the cases cited, where a substitution of one thing for another was admitted, were, where subsequent to the breach of the covenant the covenantee agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated. I rather think there are cases to shew, that where one covenants to convey by a certain day in such manner as the counsel of the vendee shall advise, the vendor must allege that he called upon the vendee to name his counsel; and that he went to the vendee's counsel and demanded him to point out the conveyance he would have: but that either the vendee would not name his counsel, or that the latter when required would not point out the sort of conveyance. But here there is a decisive answer on this ground, that the parties came to a subsequent agreement by

(*i*) *Thorpe v. Thorpe*, 1 Salk. 171.

See *Lea v. Adams*, 3 Bulstr. 35.

(*k*) *Campbell v. Jones*, 6 T. R. 570.

(*l*) *Heard v. Wadham*, 1 East, 619.

(*m*) *Supra*.

parol to do a different thing from that which the covenant required; and the plaintiff attempts to maintain an action on the former contract, by proving the performance of that subsequent agreement, and not the contract declared on. Even, if there were no remedy at law on the subsequent agreement, the plaintiff might still go into equity: but I see no objection with respect to the statute of frauds, where the contract has been executed. *Grose and Le Blanc JJ.* concurred. If no time is mentioned, the time of making the conveyance must be reasonable, and the money must be considered as payable within a convenient time after the conveyance executed. (*n*)

Where (*o*) a lessee for years with reversion to one M. having spent money, and having been at charges in ejectment brought against him in defence of the title, desired M. to contribute to the charges, or make him some other recompence; whereupon M. promised that for the consideration aforesaid he would grant him such a lease at the expiration of the term as he then had, which he afterwards refused to do, it was held that no action of assumpsit lay on this promise, because the consideration was executed before the making of the promise.

If the lessor covenant that if the lessee surrender the old lease at any time during his life, he will make a new lease for a greater number of years, and the lessor grants his reversion; the lessee need not now surrender his lease: but he may bring covenant, because the lessor has disabled himself. (*p*) But where in consideration the plaintiff would make the defendant a lease of certain lands, he (the defendant) promised to pay 20*l.*, and the plaintiff alleged in fact that he had made a lease to him for five years: It was moved in arrest of judgment, that the promise should be intended to be to make a lease for life: but *per curiam*, the promise being general, it might as well be intended a lease at will as for life, which was no consideration to ground an action on, and judgment was stayed. (*q*) So the surrender of a lease at will is no consideration for a promise. (*r*)

The case of *Moggridge v. Jones* (*s*) appears to involve a different

(*n*) *Barnard v. Simon*, 1 Vin. Abr. . Formance of covenants.

291. pl. 1.

(*q*) *Fereby v. Larkin*, Cro. Eliz.

(*o*) *Moore v. Williams*, 1 Moor. 220.

566. : but see *Noy*. 65. S. C.

Moore v. Williams, And. 137.

(*r*) *Thorpe v. Thorpe*, Com. Rep.

(*p*) *Scot v. Mayne*, 5 Rep. 20. b. S. C.

99.

Moor. 452. in debt on bond for per-

(*s*) 3 Campb. N. P. C. 38.

principle from the common cases of contract. It was an action by the payee against the acceptor of a bill of exchange, payable eight months after date. On the day the bill bore date the parties entered into an agreement for the sale of the lease of a house for which the defendant was to pay the plaintiff the sum of 500*l.* by three bills of exchange, at eight, eleven, and fourteen months. The bill in question, together with two others, making up the 500*l.*, were accordingly accepted by the defendant; and he was let into possession of the premises: but the plaintiff refused to grant the lease in pursuance of the agreement. At Nisi Prius Garrow for the defendant contended, that the consideration for the acceptance of the bill had failed, and that the action therefore could not be maintained; upon the general principle that, where the consideration of a bill of exchange fails entirely, it will be a sufficient defence to an action upon it by the original party. (i) But Lord Ellenborough said there was originally an ample consideration for this bill of exchange; and it has not completely failed, as the defendant has continued in possession of the premises. He cannot say that the agreement is entirely rescinded. He must pay the bills and bring his cross action, or go into equity for a specific performance. This opinion of Lord Ellenborough was, according to the distinction taken in the case of *Morgan v. Richardson*, (u) between a total failure of the consideration, and a partial failure only. Under the latter circumstances the giver of the bill must resort to his remedy by action against the person to whom it is given; and, upon a motion for new trial, the Court of K. B. took the same view of the subject. (v) Lord Ellenborough, C. J. observed, that the money agreed upon for the premises would have been payable immediately: but for the convenience of the defendant the plaintiff agreed to take his acceptances at a future day. This bill must therefore be paid in course when it is due, and the defendant will have his remedy upon the agreement for the non-execution of the lease. It may perhaps be more satisfactory to point out a slight inaccuracy in the statement of the facts in the report at nisi prius. It is there said, that the contract was for the sale of a lease of a house, &c. whereas from

(i) See a note of the case of *Morgan* N. P. R. 346.

v. Richardson, (cited in 7 East, 486) (v) *Moggridge v. Jones*, 14 East, in 1 Campb. N. P. C. 40. n. 486.

(u) See *Tye v. Gwynne*, 2 Camp.

the memorandum, as stated in the report in *East*, it appears that it was an agreement to grant a lease. The memorandum being in the following terms. Mem: A. agrees to let, and B. agrees to take the messuage in question, to hold from the 29th of Dec. next, for the term of twenty-one years, under the yearly rent of 120*l.*, &c. &c.

Since the only remedy for breach of agreements which the law can give by action is in damages, and courts of equity are in the habit of granting a specific performance of the contract, the cases on the subject of agreements are much more numerous in equity than at law. The following observations will in the main be confined to stating as much of the equitable doctrine of specific performance as is consistent with the subject of leases.

In the case of *Lawrenson v. Butler* (x) the decision of Lord Redesdale proceeded upon the general principle that, where nothing has been done on either side under an agreement, a court of equity could not decree a specific performance, except where the right to compel was mutual. However just and equitable this opinion may be in ordinary cases; (y) yet, with relation to the requisites of an agreement under the fourth section of the statute of frauds, the inclination of courts of law and equity in England seems to be, to hold that such a right may exist without mutuality. (z) And therefore that specific performance may be enforced by one of the parties who has not signed against the party signing. And in one case specific performance was decreed of an agreement, of which only one part was found signed by the lessee: but it was in the possession of the defendant the lessor, and there were other circumstances. The plaintiff had been in possession a considerable time; drafts had been prepared and approved; and it appeared that the execution was only deferred till the repairs were completed, although it did not appear that this was an extension of the agreement. An extension of the term, according to a subsequent written variation of the agreement, was refused on the ground of a want of consideration. (a)

The same position has also been sometimes stated thus:

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| (x) 1 Scho. and Lefr. 13. | <i>Huddleston v. Briscoe</i> , 11 Ves. 583. |
| (y) <i>Bromley v. Jefferies</i> , 2 Vern. 415. | <i>Western v. Russell</i> , 3 Ves. and B. 187. |
| <i>Armiger v. Clerk</i> , Bunb. 111. | <i>Coleman v. Upcot</i> , 5 Vin. Abr. 57. pl. 17. |
| <i>Hamilton v. Grant</i> , 3 Dow, P. C. 33. | (a) <i>Robson v. Collins</i> , 7 Ves. 130. |
| (z) <i>Allen v. Bennett</i> , 3 Taunt. 176. | |

that the necessity of signature is merely matter of evidence, and therefore the party signing cannot object that the agreement is not signed by the other side. (b) The principle however requires this further correction, that unless the memorandum state both the contracting parties, the purchaser as well as the seller, or with reference to our present subject the landlord as well as the tenant, it will not be sufficient to bind the one named, though he has signed. The case (c) cited in support of this position was to the following effect: A person made a minute of the contract in the common memorandum book of another, stating himself to be the seller, but did not name the other person, and it was held that this was not sufficient to bind him in an action brought by the other as buyer. But Sir J. Mansfield, C. J. is reported to have said, that if the memorandum of the contract had been inserted in the regular order book of the plaintiff, the buyer, and if the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed, had been consonant and consistent; perhaps it would not have been too much to infer that the entry was made by the authority of the owner of the book for the purpose of evidencing the sale. (d)

The general rule, that parol evidence is not admissible to vary written instruments, prevailed before the statute of frauds. On the ground, however, of fraud, mistake, or surprise, it has been allowed in the case of defendants for the purpose of getting rid of contracts altogether: but if in a bill for specific performance the defendant insists that the evidence being received, he will be entitled to a specific performance, with an abatement of price, it cannot be admitted for that purpose; because that comes directly within the principle upon which it is inadmissible in the case of a plaintiff. (e) The statute of frauds has made no alteration in the rule of law in this respect; and the defendant may now give

(b) *Hutton v. Gray*, 2 Ch. Ca. 164. *Seton v. Slade*, 7 Ves. 265. *Fowle v. Freeman*, 9 Ves. 351. See also the words of this section of the stat. viz. "*signed by the party to be charged therewith.*"

(c) *Allen v. Bennett*, 3 Taunt. 169.

(d) See 1 Phill. Ev. 459.

(e) *Jordan v. Sawkins*, 3 Bro. Ch. Ca. 388. *Winch v. Winchester*, 1 Ves.

and B. 378. *Clarke v. Grant*, 14 Ves. 519. *Ramsbottom v. Gosden*, 1 V. and B. 165. *Garrard v. Grinling*, 2 Swanst. 244.

(f) See *Pember v. Mather*, 1 Bro. Ch. Ca. 51. *Rich v. Jackson*, 4 Bro. Ch. Ca. 514. 6 Ves. 334. n. c. *Marquis Townshend v. Stangroom*, 6 Ves. 328. *Woollam v. Hearne*, 7 Ves. 211. *Higginson v. Clowes*, 1 Ves. and B. 524.

the same evidence to nullify a contract as before. (f) The same observation applies equally to the case of omitting any terms of the agreement, as to the actual insertion of terms differing from those which were intended to be expressed. A dictum of Lord Hardwicke (g) appears to militate against this distinction: but the opinion so expressed is not only in opposition to the correct principle of law, but to the express authority of all subsequent cases. The accuracy also of the report of the case referred to is very questionable, as appears by reference to another note of the same case, cited by Lord Redesdale in *Clinan v. Cook*. (h)

From some expressions of Lord Loughborough, in *Rich v. Jackson*, (i) it might be inferred that, although a written agreement for a lease could not be departed from by parol evidence, except with a view of shewing that the contract ought not to be enforced upon the ground of fraud, surprise, or mistake, a distinction might be admitted with respect to the case of a subsequent independent agreement. It is clear, however, from the cases which have been decided, that the rules applied by courts of equity to the case of a subsequent agreement depend upon the same principles with those which are established in cases of an original agreement; and that, with respect to a subject affected by the statute of frauds, a subsequent agreement, changing the situation of the parties, and their rights and interests as derived from an agreement already existing, must either be authenticated in the manner which the statute directs, or be brought within the scope of the known and regular exceptions. (k)

The case of *Pym v. Blackburn*, (l) which has relation to the points included in the preceding discussion, is so peculiar in its circumstances, that it can only be stated as a case *sui generis*. A. the defendant in the original bill (who died in the progress of the cause) was tenant to the plaintiff of a public-house, at the rent of 65*l.* upon a lease for twenty-one years, which would expire in 1795. In 1791 a written agreement was entered into that A. should, with all convenient speed, do certain repairs particularly specified; and that he should accept a new lease from the

(g) *Joynes v. Statham*, 3 Atk. 388.

(k) *Anon.* 5 Vin. Abr. 522. pl. 38.

(h) 1 Sch. and Lefr. 28. and *Rich v. Jackson*, 4 Bro. Ch. Ca. 514.

Legal v. Miller, 2 Vez. 299. *Price v. Dyer*, 17 Ves. 356.

(i) 4 Bro. Ch. Ca. 514.

(l) 3 Vca. 34.

day of for thirty-one years, at a rent of 85*l*. The plaintiff insisted that the agreement was, that A. should surrender his existing lease; and that the new lease should commence from the completion of the repairs. The answer denied the agreement for the surrender of the existing lease, or that the new term was to commence before the expiration of the old lease; and insisted that the blanks were left in consequence of the plaintiff being at a distance from London, where he could not conveniently obtain the counterpart of the lease in order to insert the date at which the subsisting lease would expire. Sir P. Arden, M. R., after stating the respective allegations, said, "Suppose the plaintiff meant what he says,—is the defendant bound to perform an agreement, which the plaintiff understands in one way, but which the defendant had a right to understand in another? Has the plaintiff made out that the defendant acceded to the agreement? Did he ever accept an agreement binding himself to surrender the existing lease, and take that tendered by the plaintiff? I admit there is difficulty on both sides: but (though the plaintiff, I doubt not, meant what he says) the true construction is so much in favour of the defendant, and a construction a man had a right to act upon, that I cannot compel him to perform an agreement so strange even according to the plaintiff's construction; for if the term of the repairs being completed was the point of time, is it not common sense to say that? But was it not more proper that he should fix a time, within which it should be done? The plaintiff by his negligence has drawn himself into an agreement he never meant to make. If I had been to read this agreement without any suit, I should have supposed that the defendant had four years to make the repairs in. He has fulfilled the agreement so far by completing the repairs. I cannot do what the plaintiff desires. I cannot collect that the defendant ever consented to surrender his lease, and take a lease from any other time than the expiration of the former. It would be very dangerous upon this bill and answer to permit parol evidence on either side. To let in the evidence of the plaintiff's surveyor would be very dangerous. Therefore, as it stands, the plaintiff is entitled to specific performance if he insist upon it: (m) but he has not made out any case for a decree that the defendant shall accept a lease to commence at a time prior to the expiration of the former lease."

(m) Query, if resisted by the defendant.

The cases which relate to the doctrine of waiver by parol of written agreements are the following. The first case (*n*) is reported very shortly thus:—"The single point of this case was, whether an agreement in writing made since the statute of frauds and perjuries might be discharged by parol? And Lord Keeper held it might, and therefore dismissed the bill, which was brought to have the agreement executed in specie." The authority of this case has been disputed, it not being in the Registrar's book. In *Legal v. Miller*, (*o*) the last mentioned case was referred to by the master of the rolls, as an authority for his decision, but without any particular observation respecting it. In the recent case of *Price v. Dyer*, (*p*) the defendant insisted on the fact of waiver; with respect to which Sir W. Grant, M.R., said, "It is then said the agreement was waived; and that a written agreement may be so far waived by parol that the Court will refuse the interposition of its equitable jurisdiction to support it. Not conceiving that there was in this case any waiver within the meaning of the dicta or decisions upon this subject, it is not necessary for me to give a precise opinion upon the point: but, as at present advised, I incline to think that, upon the doctrine of this court, such would be the effect of a parol waiver clearly and satisfactorily proved; but here was no such waiver. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract; restoring the parties to their former situation. No such thing was for a moment in the contemplation of these parties. From the history of the transaction, in the answer and the evidence of the solicitor, all they at any time meant was to add to and modify the terms of the original agreement."

In *Backhouse v. Crosby*, (*q*) which was a bill for specific performance of a contract of sale, evidence being given of a parol waiver between the defendant and a subsequent purchaser, Lord Hardwicke said he would not say that a contract in writing could not be waived by parol; yet he should expect in such case a very clear proof; and the proof in the present case he thought very insufficient to discharge a contract in writing; and observed that the statute of frauds requires that all contracts concerning lands

(*n*) *Gorman v. Salisbury*, 1 Vern. 240.

(*o*) 2 Vez. 399.

(*p*) 17 Ves. 356.

(*q*) 1 Eq. Abr. 32. See the facts of this case stated in note to 1 Phill. Ev. 599. 3d edit.

should be in writing. Now an agreement to waive a purchase is as much an agreement concerning lands as the original contract. However, he said, there was no occasion then to determine the point. The doctrine in this case that the Court would expect very strong proof has been commonly inserted in abridgments and treatises as forming a rule of law : but the sufficiency of evidence is in every case a matter of fact ; and whenever it is admitted that a certain conclusion should result from given premises, the adequacy of the proof by which the existence of those premises is established must resolve itself into the conviction of the judge as to the existence or non-existence of the fact. (q)

Upon the question, how far parol variations of a written agreement may be a bar to specific performance, the master of the rolls, in the case above cited of Price and Dyer, (r) made the following observations : "Variations so acted upon that the original agreement could no longer be enforced without injury to one party would be a bar to a specific performance of that original agreement. Such was the case in *Legal v. Miller*. (s) The original agreement was unexceptionable : but the execution of it under the new circumstances would have been a fraud upon the landlord ; he having rebuilt instead of repairing the houses, and the tenant having agreed to pay an additional rent in consideration of the additional expense. But variations verbally agreed upon, supposing any to have been so agreed upon in this case, are not sufficient to prevent the execution of a written agreement ; the situation of the parties in all other respects remaining unaltered. The defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss : he will only be disappointed of that advantage which he expected to derive from the gratuitous covenants of the plaintiff."

In *Gourlay v. The Duke of Somerset* (t) a lease and counterpart had been tendered to the plaintiff (the lessee) who was required to accept the lease, and execute the counterpart ; which he refused to do, acknowledging that he had not read the lease, but stating, that he considered the agreement sufficient for him. It was contended, that this was a waiver or repudiation of the original agreement : but Lord Eldon said that, although he agreed

(q) MS. observation by Sir W. D. Evans.

(s) 2 Vez. 399.

(t) 1 Vez. and B. 68.

(r) 17 Ves. 364.

that a refusal to execute a lease must be a refusal to stand by the lease; but if it goes no further than that the man thought the agreement as good a lease as he could have, that does not amount to a declaration that he never would execute a lease, and cannot be considered as repudiating the agreement with which he declares himself satisfied.

If the defendant confesses the agreement, and insists upon the statute, it will be a bar to the plaintiff's claim of specific performance of a parol agreement: (u) but if he does not insist on the statute, he must be taken to have renounced the benefit of it. (x) So if he admits the agreement by his answer, and submits to perform it, he cannot by his answer to the amended bill have the benefit of the statute. (y)

The plaintiff if he fails to prove his own agreement, and the defendant is allowed to give parol evidence of a different one, cannot resort to the defendant's agreement: (z) but where the plaintiff, by an amended bill, prayed in the alternative that, if not entitled to the performance of the original agreement, he might have execution of the admitted one, the bill was dismissed without prejudice to a bill for the performance of the admitted agreement. (a) On the other hand, if the defendant, after proving a written agreement different from that of the plaintiff, submit to perform such agreement proved by him, he may have a decree upon his answer without filing a cross bill. A cross bill was formerly the course: but it would be now dismissed with costs as being unnecessary. (b)

The jurisdiction of courts of equity, in cases of fraud, has introduced a large exception of cases out of the statute of frauds on the principle of part performance of parol agreements. But in order to amount to part performance, so as to exclude the application of the statute, the act must be unequivocally referable to the agreement. A party who has permitted another to perform such acts on the faith of an agreement shall not insist that the agreement is bad, and that he is entitled to treat those acts as if

(u) *Whitchurch v. Bevis*, 2 Bro. Ch. Ca. 550. *Cooth v. Jackson*, 6 Ves. 37. *Moore v. Edwards*, 4 Ves. 23.

(x) *Croyston v. Baynes*, Prae. Ch. 208. *Symondson v. Tweed*, Gilb. Eq. Rep. 35. *Proc. Ch.* 374. S. C.

(y) *Spurrier v. Fitzgerald*, 6 Ves. 548.

(z) *Legal v. Miller*, 2 Ves. 299.

(a) *Lyndsey v. Lynch*, 2 Scho. and Lefr. 1.

(b) *Fife v. Clayton*, 13 Ves. 546.

they never existed. But nothing is a part performance which does not put the party in a situation that it would be a fraud upon him if the agreement should not be performed. (c)

Possession taken in pursuance of a parol agreement or in other words, possession given by the person having the possession to the person claiming it, purchasing fixtures, or any similar act of ownership, may have the effect of taking the case out of the statute, where it clearly appears what the agreement is. (d) Although acts merely auxiliary to the agreement, such as putting a deed into the hands of a solicitor to prepare the conveyance, have not the same effect; (e) so where the agreement was conditional on the vendor's procuring the release of the claim of a third person, and he procured it for a valuable consideration, it was not considered a part performance to take it out of the statute. (f)

In *Kine v. Balf*, (g) Lord Manners decreed specific performance on the prayer of a landlord against a tenant on this principle, the tenant having taken possession and paid rent. "How is it possible," said his Lordship, "to refer this possession to any other title but this agreement. And what is the situation in which this plaintiff is placed by the conduct of the defendant? The defendant could at any time enforce this agreement against the plaintiff; he would be protected in this Court against an ejectment, and from being treated as a trespasser; and the plaintiff was by this contract and the acts of the defendant disabled from dealing with any one else for the land." In this case, the defendant insisted that it was one of the terms of the agreement that he should be at liberty to surrender the premises; and there being contradictory evidence, an issue was directed and a verdict given in favour of the plaintiff.

Payment of the substantial part of the purchase money has been considered tantamount to an execution: (h) but the principle has been disputed; and clearly, merely paying the deposit on a sale by auction (i) will not be sufficient.

If possession is delivered and money is laid out in building or improving it, part performance and parol evidence is admissible

(c) See *Climan v. Cook*, 1 Scho. and Cas. 400.

Lefr. 22.

(f) *O'Reilly v. Thompson*, 2 Cox,

(d) *Bower v. Cator*, 4 Ves. 91. 6 Ves. 271.

470. *Lester v. Foxcroft*, Collis. P. C.

(g) 2 Ball. and Beatt. 343.

108. *Wills v. Stradling*, 3 Ves. 381.

(h) *Main v. Melbourne*, 4 Ves. 720.

1 Freem. 269.

(i) *Buckmaster v. Harrop*, 7 Ves.

(e) *Bedding v. Wilkes*, 3 Bro. Ch. 346. S. C. on Appeal, 13 Ves. 456.

to shew the terms. (j) But a promise to renew in consequence of money already laid out is *nudum pactum*, and not to be specifically performed; neither does money laid out afterwards vary it. (k) Neither is there any general equity to renew in consequence of expenditure under the observation of the landlord, not under any specific engagement or arrangement. (l) In the case last cited the case represented by the bill, and proved by one witness, was an agreement in 1790 by the defendant that, in consideration of repairs and improvements of mills situated upon the premises, the plaintiffs should not be disturbed during the defendant's life; and expenditure by the plaintiffs, under that agreement, to the amount of 5000*l.* in 1794. The answer contained a positive denial of that or any other agreement previous to the year 1794 or that the defendant ever induced or led the plaintiffs to make, finish, or complete, the said alterations, improvements, or repairs, or lay out money upon any promise or assurance of a lease for the life of the defendant, or any other term, or upon any promise or assurance that they should not be disturbed during his life, or to the like effect, insisting that the only agreement took place upon the 4th of April, 1794, in consequence of a letter dated the 24th of March preceding, to the defendant from one of the plaintiffs; the necessary alterations and improvements being estimated at 500*l.*, and the defendants agreeing to advance 300*l.* to furnish wood at a reasonable price at about 100*l.*, and stone gratis, and to have interest at 5*l. per cent*: the agreement proved by the single witness of the plaintiffs being denied by the answer, according to the practice of the court, it could not be enforced; and it became necessary, from a review of the circumstances of the case, to see whether there was any general principle of equity in support of the plaintiff's case. In that view the following observations of Sir W. Grant seem important:—"There are different positions in the books with regard to the sort of equity arising from laying out money upon another's estate, through inadvertence or mistake; that person seeing that, and not interfering to put the party upon his guard. The case with reference to which that proposition is ordinarily stated is that of building upon another

(j) *Floyd v. Buckland*, 2 Freem. 268. *Toole v. Medlicott*, 1 Ball. and Beatt. 404. (k) *Robertson v. St. John*, 2 Bro. Ch. Ca. 139. But see post. p. 191. (l) *Pilling v. Armitage*, 12 Ves. 78.

man's ground. That is a case which supposes a total absence of title on the one side; implying, therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected that the party should advertise the other that he is acting under a mistake. But, I do not know any case in which a lessee either of a term or from year to year, making any improvement upon the estate in his possession, though with the complete knowledge of his landlord, has been entitled as against the landlord to have his lease prolonged until he shall obtain reimbursement for the improvements he has made; for he has a title of which he knows the duration. He is not under a mistake with regard to the nature of his title. He may, perhaps, be imprudent, if the expectation that his lease will be renewed or his possession from year to year will continue prove unfounded. But because that expectation is disappointed, can I say he has acquired a right to a prolongation of his lease, or to a lease for a certain period? What is the information the landlord ought to be expected to give in such a case? As there is material information to be given by him in the case of a decided mistake, so it might be very material information if there is a certain lease, but bad in law; though I will not pronounce a decided opinion upon that. But what information can he give to a tenant from year to year, (which was the nature of the tenancy in this particular case) other than he possesses, *viz.* that he is a tenant from year to year, making improvements, and laying out money upon an estate in which he has no permanent interest." "I am now supposing," continued his honour, "there was no promise by the defendant to quiet the plaintiffs in the possession for his life; for upon such a promise, if established, they must succeed: but, treating it merely as the case of improvements made in his view, that information would not have conveyed to them any thing they did not possess. Then suppose it was the habit of his family to permit tenants to remain from generation to generation, but he is not sure that he shall let every tenant remain for an indefinite period of time. That is implied from the nature of the thing, that the landlord is not bound to act upon that habit; then could they have said, they were making improvements upon the supposition that they were upon a footing with the other tenants? He (the defendant) swears distinctly he had no such intention, at the time, during which the improvements were going on, to

deprive them of their possession; and it was a circumstance that occurred after the improvements were made, and totally independent of them, that induced him to deprive them of the possession. Then what conduct is a person in that situation to hold, to prevent that equity attaching? I do not know what distinct obligation there is upon the landlord;—can it be said he must have supposed they were acting upon what passed in 1790, and therefore he ought to have warned them? That is inconsistent with the whole tenor of his defence; for he denies any promise in 1790, upon which they ought to have acted, and states that he had totally forgotten it. Also, taking the agreement of 1794 to have existence, there was a case to which he could refer the improvements; for in the nature of that arrangement is implied that some improvements should take place. At what period am I to say he must have seen that they were exceeding the limits of any expense they could reasonably be supposed incurring in consequence of the arrangement of 1794? Of course he was to see some improvements, and there was no neglect in not guarding against making those. But suppose there was a period, it would then come back to the case of a tenant from year to year, making improvements at his own discretion, upon the hope arising from the habit of his landlord, that it would be worth his while to take the chance, having no apprehension of being disturbed; and I believe that is the real truth of this case. These parties, independent of any promise, rested so much upon the faith that they should not be disturbed in the enjoyment, as their ancestors had not been for many years, that they thought themselves as safe as if they had a lease;—but can I convert that hope into an actual engagement by the landlord, binding him down to permit them to continue in possession not for a definite period according to the agreement in 1790, but until they shall be reimbursed? See how far this would extend. The case hardly occurs of a good tenant, especially where tenants are seldom turned out, who does not make some improvement. Can a court of equity say such a tenant is never to be removed until it has been settled in equity how much he has laid out under the expectation that he should not be turned out, and the landlord would not exercise his legal right until reimbursement? This is a hard case upon the plaintiffs, if they lose all this money. But to give redress in a particular case, likely to occur rarely, am I to lay down a principle that would shake the

security of property in almost all its ramifications, and the dealings of men with each other? For that purpose, I must say, that the true measure of justice is, that a landlord shall never turn out a tenant if improvements have been made with the knowledge of the landlord until the tenant shall be completely reimbursed. The only possible ground is upon the footing of the agreement of 1794: but that is inconsistent with the shape of the bill. If a landlord enters into an arrangement with a tenant relative to improvements, and so completely sanctions them that he himself agrees to advance part of the money, implying that another part is to be advanced by the tenant; I doubt whether that does not fasten an equity upon the landlord, precluding him, when these improvements are made under his authority, from saying there is an end of the lease. Such an arrangement, though without a specific agreement, would imply one, as it would be so contrary to good faith to encourage a tenant in so positive and direct a manner to proceed in particular improvements, and then deny him all benefit, that I think equity would interfere, and hold it an implied term that the tenant should have the fair benefit from the improvements thus made by the concurrence of his landlord. But the bill is not framed for redress upon that ground. On the contrary, they (the plaintiffs) entirely pass by this agreement, and will not admit that their improvements had the slightest connexion with it. Bill dismissed, but without costs.

Upon the case of *Robertson v. St. John*, (m) Sir W. D. Evans observes, that he has sometimes had doubts whether there was not sufficient mutuality to come to a different conclusion from that arrived at in that case. Lord Bolingbroke, tenant for life, with remainder to his son the defendant in fee, granted a lease for 31 years, covenanting that his son should confirm it when he came of age. Soon after the defendant came of age the lessee wrote to him stating his agreement with his father, and that in consequence of it he had laid out considerable sums of money. To this letter the defendant wrote the following answer: "The agreement certainly does not bind me: but the money you have laid out certainly entitles you to a renewal from me, which I shall be happy to give you on this consideration." The bill which was filed by the assignee of the lessee who had become bankrupt, alleged that

(m) 2 Bro. Ch. Ca. 139.

the lessee and also the plaintiff had laid out further sums on the premises, and prayed a specific performance; and it being urged upon demurrer to the bill, that the agreement as stated was *nudum pactum*, Lord Thurlow said, that the intention of laying out further sums not being mentioned in the letter, the promise was *nudum pactum*, which equity would not perform in specie; although had he stated that intention, and the promise had been founded on it, the plaintiff should have had a specific performance. The circumstance of laying out the money afterwards, as it was voluntary, will not vary the nature of the case. The objection of Sir W. D. Evans seems to be, that there was no occasion in this case to consider the effect of the previous or subsequent expenditure as to the mutuality of the contract; because in every agreement for a lease the agreement to take a lease is a sufficient consideration for the mutual agreement for granting one; and the question cannot be affected by any considerations of excess of benefit on the one side or the other. Here it was admitted on both sides, that the agreement with the father was binding on the son: but it might be fairly questioned whether the transaction by letter did not amount to a concluded agreement, as far as it went, to grant a lease within the statute of frauds; and then the circumstance of the motive alleged being the past expenditure of the lessee was immaterial, since without any such allegation there would have been a sufficient mutuality, if it appeared that it was the intention of the one party to grant a lease, and the other to take it. With respect to this particular case other questions might have arisen on the ground of the admissibility of parol evidence, which might ultimately have produced the same result as that to which the court came: but the principle would have been essentially different. It seems to be clear, however, that a parol agreement in consideration of past expenditure is so far *nudum pactum*, that it will not come under the head of cases upon part performance where parol evidence is admissible; neither does it appear that money laid out afterward will vary it.

The mere fact of possession by a tenant holding over will not weigh much; because the tenant of course continues in possession until he has notice to quit: and it is not like the delivery of the possession by the person having it to the person claiming it. So likewise the payment of an additional rent under such circum-

stances is equivocal: but if, on a plea of the statute, an averment by the tenant that the landlord accepted the rent on the footing of the agreement stands uncontradicted, the payment of rent is no longer equivocal; and it is incumbent on the defendant to say whether he accepted the rent on the footing of a holding from year to year, or on what other ground. (*n*) The benefit of the plea in the case cited was saved to the hearing on the authority of the case of *Charlwood v. The Duke of Bedford*. (*o*) In the same case, (*Wills v. Stradling*) the plaintiff, the lessee of a farm, stated improvements made at a considerable expense: but the lord chancellor observed that, as to money laid out on the faith of the agreement, there was no ground for it here stated; it was not the case of a building or repairing lease; neither was the money alleged to have been laid out with the privity of the defendant.

In *Allen v. Bower*, (*p*) the lessor made a verbal agreement with his lessee to secure him in possession of the premises during his (the lessee's) life; and in consequence of this promise the lessee made considerable improvements; and after the lessor's death a memorandum (upon which some remarks will hereafter be made) was found amongst his papers, desiring that the plaintiff might not have his rent raised, as it was reasonable for him to grant a lease on account of the improvements which he had made, and which must have distressed him. Before the discovery of this memorandum, it appears that the case had been referred to the master to inquire what interest was intended to be granted; and Lord Thurlow said, the rule to direct the master would be easy, for the term must be according to the money laid out by the plaintiff: but that he must consent, if the term to be granted was such as would before that time have expired, to pay to the defendant an increased rent equal to the additional value of the farm. The master on that occasion refused parol evidence; and reported that the plaintiff was only entitled to a lease for three years, which was the longest that could be by the statute of frauds. The case was again referred to the master to state the promise made, and referred to by the paper above mentioned; and the master having received parol evidence reported, that if such evi-

(*n*) *Wills v. Stradling*, 3 Ves. 378.

in question, although it was involved in that case.

(*o*) 1 Atk. 497. But no part of the discussion, as reported, has any immediate reference to the particular point

(*p*) 3 Bro. Ch. Ca. 149. See 1 Ves. J. 331.

dence were admissible, the interest which the tenant was to acquire was an interest for life; and Lord Thurlow decreed a lease for 99 years determinable on the life of the lessee. And subsequently his lordship stated, that the decree had been made on evidence of the promise, and a part performance by the plaintiff; and it seemed to him that such promise would sustain a specific performance. But the decretal order was afterwards set aside, as having been obtained on an interlocutory motion without consent. Lord Redesdale, referring to this case in *Clinan v. Cooke*, (*supra*) said he knew it never came on again. Whether the decision would have been the same if it had, he could not say: but that must at all events have depended on its being considered a part execution of a parol agreement; for Lord Thurlow thought the paper left behind by the lessor shewed that he had come to some parol agreement, and having done so, had let the plaintiff into possession; and that the plaintiff had laid out great sums of money upon the farm. This he considered as proved by that paper, which he considered as evidence of a confession by the lessor of that fact; and this he thought sufficient ground for directing an enquiry, what was the agreement entered into to which the paper referred: that is, he considered the paper not as an agreement to be supplied by parol evidence, but as evidence of a parol agreement. There were very great doubts whether that was a solid distinction, though Lord Thurlow took it up very strongly, and his opinions were very seldom unsatisfactory.

In *Frame v. Dawson*, (*q*) the plaintiff as tenant alleged that the party wall being in a ruinous state, he applied to the defendant requesting he would either contribute to the repairs, or make some abatement in the rent; that the defendant refused to do either, but promised, in consideration of the plaintiff's repairing the party wall, to grant him a further term for ten years. The defendant admitted having said that, if the plaintiff should be obliged to pull down the wall and rebuild it, he might be inclined to grant a further term of ten years: but denied that he had made any absolute promise. Evidence having been examined in support of the respective allegations, Sir W. Grant, M. R. said, "It is admitted that, supposing an agreement ever so clearly proved; yet, as a parol agreement, the plaintiff is not entitled to

have it executed. It is necessary therefore to shew a part performance, that is, an act unequivocally referring to and resulting from the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement. But that is not the nature of the act in this case. First, it is equivocal. Secondly, it is such that it easily admits of compensation without executing the agreement. This is not an unequivocal act, for it would have taken place equally if there had been no agreement. The principle of the cases is, that the act must be of such a nature, that if stated it would of itself infer the existence of some agreement, and then parol evidence is admitted to shew what that agreement is. But this act would not infer an agreement, as it must have been done by the party either at his own or his landlord's expense. Then is there such injury as cannot be easily repaired in any other way than by executing the agreement? No: for the money which he has expended he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance, that the party may be obliged to resort to an action to recover the money, is no reason for taking the case out of the statute." The principle of compensation laid down in this case, it is obvious, is applicable to cases where the purchase money has been paid; and will go a great way to overturn the doctrine of the cases which have been before alluded to, where it has been said that payment of the substantial part of the purchase money will take the case out of the statute.

Where evidence of a parol agreement is admissible on the ground of part performance, the next question relates to the nature of such evidence. In the case of *Mortimer v. Orchard*, (r) on a bill for specific performance to renew, the plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill, and the defendants stated an agreement differing from both. In strictness the bill ought to have been dismissed: but since there were two defendants against one witness, it was held that their testimony ought to prevail, and a specific performance was decreed according to the admission of the defendants. But in subsequent cases, (s) the plaintiff having

(r) 2 Ves. J. 243.

Lindsey v. Lynch, 2 Scho. and Lefr. 1.(s) *Woollam v. Hearn*, 7 Ves. 211.

failed in establishing the agreement insisted on, the court would not decree the performance of the agreement admitted by the answer, but dismissed the bill without prejudice to bringing a fresh bill.

In *Gregory v. Mighell*, (s) there was an agreement in part performed, and possession though without express assent acquiesced in, and expenditure permitted; a specific performance was decreed, although the defendant in his answer alleged that there was a provision in the agreement that he should be at liberty to resume the possession of the land, or any part of it, whenever he might think proper: but this allegation was not supported by his witness, and was contradicted by the plaintiff's witness. In the same case it was held that an allegation of the bill that the plaintiff was to pay taxes, and do necessary repairs, not having been proved, was no substantial variance; because it was an admission against himself, and immaterial from his legal liability. The prayer of the bill was for specific performance, and injunction against an ejectment. Sir W. Grant expressed himself in the following manner, with respect to the nature of the possession of the tenant: "It is said, however, that the possession was taken without the defendant's consent, and consequently is not to be considered as a possession under the agreement. The plaintiff had no other title to possess the land, and therefore his possession is *primâ facie* to be referred to the agreement. As to the defendant's allegation that it was without consent; besides that it seems to be disproved by the two witnesses, I do not conceive that the defendant is now at liberty to say it was a possession that had no reference to the agreement, as he permitted the plaintiff to remain in possession, and to make expenditure upon the land for eight years before he brought an ejectment. He must have known that the expenditure was made upon the faith of the agreement; and I cannot now permit him to turn round and say the plaintiff has been possessing merely as a trespasser as he must be if his possession is not to be referred to the agreement."

Another point of importance remains to be mentioned in this case, of which no notice seems to be taken in the marginal abstract. The bill stated that in 1799 the defendant agreed to let

to the plaintiff, and the plaintiff to take from him, the premises in question for 21 years from 29 Sept. 1799, at a fair and just annual rent to be fixed and ascertained by two indifferent persons, the one to be chosen by the plaintiff and the other by the defendant, with liberty to the arbitrators in case of their differing to choose one or more umpires. The bill further stated that, in pursuance of the agreement, the plaintiff and defendant proceeded to the choice of arbitrators, and agreed to enter into bonds of arbitration. The bill then alleged that the defendant refused to sign arbitrators' bonds, and the arbitrators refused to proceed unless such bonds were signed. These facts were admitted on the other side. Upon this part of the case the master of the rolls said, "the non-payment of rent is accounted for by the circumstance, that the rent was not fixed in the manner stipulated by the agreement. After it was known that the arbitrators had not fixed any rent, and that none of the other means provided by the agreement were resorted to, the defendant still acquiesced in the plaintiff's retaining possession of the land: that is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed; and the court must find some means of completing its execution, as I have already said the plaintiff is not to be considered as a trespasser. Some rent he must pay: the amount must be fixed in some other mode; and it seems to me that it should be ascertained by the master without sending it to another arbitration, which might end in the same way. A specific execution must, therefore, be decreed: the master to ascertain what in 1799 would have been the fair rent of these premises, upon a lease for twenty-one years from that year; and I do not see how I can exempt the defendant from payment of costs."

Where (i) there was evidence of an agreement having been confessed by the defendant, it was decreed to be carried into execution, though proved by one witness only, and positively denied by the answer. So specific performance of a parol agreement in part performed after delivery of possession was decreed on the testimony of one witness only, supported by circumstances against the denial in the answer. (u) In this case, to a certain extent both parties were agreed: as to the fact of a contract, the quantity

(i) Only *v. Walker*, 3 Atk. 407.

(u) *Morphetts v. Jones*, 1 Swanst. 172.

of land and the possession taken under the contract, either as a tenancy from year to year or a future lease. The defendant alleged that no term was specified, and therefore the contract was not obligatory. On the other hand it was alleged and proved by A., who made the agreement as agent for both parties, that it was not the mere promise of a lease, but included a specification of what that lease was to be: to commence from Michaelmas day, 1809., at a rent to be fixed by B., afterwards reduced by both parties to 1100*l.*; and for the period of twenty-one years. Supposing this representation correct, here were all the parts of a complete contract. The question, therefore, was whether the testimony of the agent was sufficiently corroborated, it being abundantly clear that the testimony of one witness, corroborated by collateral circumstances, may prevail against the positive oath of the defendant. All that passed strongly confirmed the testimony of the agent. The fact that the parties ascertained the quantum of the rent was cogent presumptive evidence, that they had also ascertained the duration of the lease. From the time the rent was fixed, to 1815., when notice to quit was given, nothing passed further to ascertain the terms of the agreement; and the continual payment of rent during the interval is a circumstance the most improbable on the supposition that those terms were still unascertained. In this case also there was a written authority to take possession; on which it was argued that the written authority was a written agreement, which precluded the admission of parol evidence: but his honour the M. R. said he could not so consider it. It was the consequence of an antecedent agreement, and not the agreement itself; and it should not escape attention that it coincided in time with the parol agreement proved. The next act was a letter written five months after the contract, nothing having intervened to render the situation of the tenant more permanent. "I cannot," observed his honour, "interpret that letter, as referring to a mere vague promise; written in a style the reverse of imperative; expressly mentioning a lease, and evidently supposing in the tenant a title to a term; to me it seems the letter of a landlord bound by an equitable contract." It was then argued that the relinquishment by the lessee of a large portion of the land repelled the supposition of a right: but the transaction consisted not only in the relinquishment of seventy out of one hundred and fifty acres; but in the reduction of the rent from

400*l.* to 150*l.* Out of one hundred and fifty acres, which he held at 400*l.* rent, he retained eighty at 150*l.* rent. That might be a fair inducement to relinquish his right to the rest. On the whole the circumstances were abundantly sufficient to confirm the statement of the witness; and the plaintiff was therefore held to have established a parol agreement in part performed. The first agreement being once fixed such as equity will enforce, the second only reduced the quantity of land and of the rent, leaving the original agreement good for the residue.

Where it is oath against oath, and an issue is directed to try whether such an agreement existed, the Court will order the defendant's answer to be read at the trial at law: as it is a mean of trying by a jury, the credit of the witness, and the party; but if it does not depend singly on the oath of the witness, but his evidence is corroborated by circumstances, no such direction will be made by the Court on granting an issue. (x)

If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud or surprise, and to attempt thereby to set it aside: but a court of equity will notwithstanding decree a specific performance of the residue. (y)

Parol evidence is admissible to explain the terms of a written agreement, in which there is any latent ambiguity: but in general the terms of an agreement, whether in writing or by parol, ought to contain with sufficient certainty the terms on which the lease is proposed to be granted. Therefore, where (z) a tenant in possession under articles of agreement impeached by his landlord proposed to pay an increased rent, a bill for specific performance by the landlord was dismissed, because the period when the increased rent was to commence had not been agreed upon. In one case, (a) however, where there was an agreement between landlord and tenant, signed by the landlord for a new lease, to be granted at any time after the repairs should be completed by the tenant with all convenient speed; but blanks were left for the day of commencement; and the landlord, after the completion of the repairs, tendered a lease, insisting that the lease should commence from that time, which the tenant refused, because he said the new lease was to commence after the expiration of the old

(x) Only *v. Walker*, 3 Atk. 407.

Ball. and Beatt. 363.

(y) *The Earl of Anglesey v. Anneley*, 1 Bro. P. C. 289. Toml.

(a) *Pym v. Blackburn*, 3 Ves. 24. more fully stated, *ante* 182.

(z) *Lord Ormond v. Anderson*, 2

one. The master of the rolls, after refusing to admit parol evidence, said there was difficulty on both sides. The plaintiff was entitled to a specific performance if he insisted on it: but he had not made out a case for a decree that the lease should commence sooner than the expiration of the old lease. It may be, however, observed, that it is extremely doubtful whether this case would now be followed.

The duration of the estate or term of years, if the agreement be for a lease for years, should also be ascertained, (b) as well as the quantity of rent, either by the terms of the agreement, or by reference to some circumstance *aliunde* by which it may be ascertained: if these particulars depend on the approbation of a third person, or any other extraneous circumstance, a court of equity will direct proper issues to ascertain the facts before it decrees a specific performance. (c) There are cases, however, which have admitted of a qualified species of relief, although no term was specified in the agreement. When, (d) for instance, there was a memorandum of agreement between A. and B., and signed by them; expressing, that in consideration of 140*l.* A. doth agree to let, and B. doth agree to take a certain messuage at 40*l.* rent; and it is further agreed that A. shall not raise the rent, nor turn out B. so long as the rent is duly paid quarterly, and B. does not sell any article injurious to A. in his business: and the plaintiff had also paid a consideration of 40*l.* Though the terms of the agreement did not exclude the construction of its being an actual demise, as will more clearly appear by the sequel; yet the import of the whole, looking to some future interest, and a more permanent interest than from year to year, a demurrer to a bill for specific performance against A. who had succeeded in ejectment (e) was over-ruled. The Court admitted that there should be sufficient evidence of the term intended to be granted: but if the tenant might be turned out at the end of the year, he would pay 80*l.* instead of 40*l.* per annum; because 40*l.* was paid for consideration. The case, therefore, the Court thought, admitted of this limited species of relief, namely, decreeing the defendant, either to repay 40*l.*, or to execute some lease which would enable the

(b) *Clinan v. Cooke*, 1 Scho. and Bro. P. C. 322. Toml.

Lefr. 22. *Gordon v. Trevelyan*, 1 Price's Exch. Rep. 64.

(d) *Browne v. Warner*, 14 Ves. 15d.

(e) See *Doe d. Warner v. Brown*,

(c) *Plunket v. Lord Kingsland*, 1 8 East 165.

plaintiff to recover at law. The execution of the ejectment was restrained by injunction, and the injunction was afterwards continued (*f*) to the hearing upon the terms that the plaintiff should permit the defendant to repair, and should pay the arrears and accruing rent; but without any prejudice to any action which the defendant might bring against the plaintiff for the mesne profits beyond the sum of 40*l.* a year, from the time of the recovery in ejectment during the time the plaintiff should so hold over. The case does not appear from the reports to have ever come to a final hearing.

But the reference which has been mentioned must be clearly made in order to admit parol evidence. Therefore, where (*g*) an estate was advertised to be let for three lives, or thirty-one years, and a written contract was entered into for letting the premises without specifying for what estate, and not mentioning the advertisement, it was held by Lord Redesdale, that the advertisement could not be incorporated into the agreement by parol evidence. With respect to the general question, his lordship said, "Here, if the agreement had referred to the advertisement, I agree parol evidence might have been admitted to shew what was the thing (namely, the advertisement,) so referred to. Further, it would have been an agreement to grant for so much time as was expressed in the advertisement, and then the identity of the advertisement might be proved by parol evidence." So where (*h*) an agreement referred to so much of another paper as had been read, it was held by Mr. J. Buller, sitting in Chancery for Lord Thurlow, that such reference was not sufficient, and could not be supplied by parol evidence. The learned judge, in delivering his opinion, said, "The whole depends upon parol. If the agreement is certain and explained in writing, signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute, and introduce all the mischief, inconvenience, and uncertainty the statute was designed to prevent." (*i*) The necessity, that the entire agreement should be in writing, and not in any respect depend upon parol evidence, was also expressed

(*f*) See 14 Ves. 412.

(*g*) *Clinan v. Cooke*, 1 Scho. and Lefr. 22.

(*h*) *Brodie v. St. Paul*, 1 Ves. J. 326.

(*i*) See Lord Redesdale's observations on the report of this case in 1 Scho. and Lefr. 35.

by the Court of Exchequer, in the case of *Stakes v. Moor*.^(k) So in *Blore v. Sutton*,^(l) a material part of the agreement not being included in the written agreement, Sir W. Grant stated it in objection to the specific performance, that the whole agreement was not in writing.

In the case of *Brodie v. St. Paul*, abovementioned, Mr. Justice Buller expressed an opinion that there could be but one construction upon the nature of frauds : whatever it is, observed the learned judge, it ought to hold equally both in courts of law and of equity; and that as it is settled in equity, that a part performance takes it out of the statute, the same rule shall hold at law. But in *Cooth v. Jackson* ^(m) Lord Eldon took an opportunity of expressing strongly a contrary opinion to that of Mr. Justice Buller. "If you address yourself," observed his Lordship, "to the question how courts of law are to execute the equitable jurisdiction in questions of part performance, it is absolutely impossible that they can exercise it. All the doctrine of this court, (that is, a court of equity), attributes great weight to the oath of the defendant. It seems to have been forgotten in courts of law, that here the testimony of witnesses is appreciated not only by the intrinsic credit due to that testimony, but also by the consideration what the defendant, against whom it is produced, has said by his answer. If the defendant denies that any parol agreement ever took place, a court of equity will not inquire into the truth of that denial. In every case where the parties go to issue, (at law) a court of law must understand that the defendant does deny the agreement; and a single witness would according to that doctrine fix upon the defendant the whole effect of the equitable jurisdiction; whereas, if the plaintiff comes into equity, the moment the defendant in the form in which issue is here joined by his answer says there was no agreement, the witness would not be heard; or if he was heard, unless supported by special circumstances, giving his testimony greater weight than the denial by the answer, the court would not make the decree."

The objection, observes Sir W. D. Evans, of uncertainty ought not to be confounded with ambiguity; unless in cases where the ambiguity is of such a nature as not to be removed by the process of judicial construction; for where a court by aid of construction

^(k) 1 Cox 210.

^(m) 6 Vcs. 39.

^(l) 3 Meriv. 237.

infers the existence of a given intention, such intention, once established, must for all ulterior purposes be considered as equally certain as if it had been distinctly expressed. In the following case, (a) however, Lord Redesdale appears to have thought that a considerable degree of ambiguity, although not amounting to uncertainty, in the sense in which it has been endeavoured to distinguish it, was a sufficient objection to equitable relief: but the observations were not essentially necessary to the decision of the case. The defendant made a lease for 6 years, at a rent of 85*l.*, with a covenant, during his life, to renew the lease by giving another lease when applied for: the plaintiff to have a power to surrender upon giving six months' notice. Such notice having been given; upon a subsequent treaty, the defendant indorsed an undertaking upon the lease, to perfect a fresh lease to the said lessee at any time when he should demand the same, at 5*l.* a year less than the within mentioned rent. The question so far as relates to the present purpose was, whether this agreement extended to a repetition of the covenant for renewal. Lord Redesdale having expressed his opinion, proceeded to say, "The instrument is certain to a certain extent, that is, as a contract to grant a like term as that in the instrument on which it is indorsed: but there is nothing from which it is by any means to be inferred to be a contract to grant a future as well as present lease. Then if it be uncertain whether the contract extended to a future lease, I take it there can be no ground for coming into equity to enforce it. This uncertainty in itself may form a ground of objection: the consequence is, unless the conscience of the court be sufficiently satisfied by such evidence as it can allow, that there is a contract for a future lease, it cannot interfere. It might be different if the instrument would be merely nugatory, if it were held not to give what was contended for: it might be well argued in that case, that the party must have intended to enter into some contract, and that it must have been fraud so to express this agreement, that it contained no contract. But it is different, where the agreement may have a certain effect, though not to the extent contended for. In the case of *Brodie v. St. Paul*, because part of the contract was, that the lease should contain such of the covenants as had been read, and as it was impossible to ascertain what they were

(a) *Hirrell v. Yiddling*, 2 Scho. and Lef. 240.

but by parol, the court could not execute the agreement, and yet the party who signed that agreement meant to make some agreement: both parties might be said to be to a certain degree in fault, by leaving the agreement so far uncertain." With reference to the principal case, Lord Redesdale said, "it is too uncertain whether he has done so, (*i. e.* whether the defendant intended to include a covenant for renewal) to admit of its being the foundation of any proceeding either at law or in equity. And I think it is important that this should be so considered, because the true foundation, on which a party is to be charged specially on the contract, is that he knowingly entered into the engagement, which is sought to be specifically enforced; and, if the terms are ambiguous, it is impossible for the court to say that he has done so. The court cannot be certain it is doing justice when it acts on such contracts; and it is better even, for avoiding fraud, to suffer the party to escape out of a contract which he may have intended to make, when it is so ambiguously expressed, than to attempt to enforce it on a conjecture that such was the intent of the parties. Nothing gives so great an opening to fraud as ambiguous words in an instrument. Persons executing instruments are frequently not acquainted with the meaning of the words, even where they are clear: but if words in themselves ambiguous were permitted to operate to create a contract, which it may not have been the intention of the party to enter into, and where the consequence would be to charge the party beyond the clear effect of the words, it does appear to me that the courts would run the risk of doing greater mischief. They may do injustice in a particular case by refusing to act on such ambiguous words: but, on the other hand, they may induce persons who intend fraud to use ambiguous words for the purpose of fraud." On the whole of the case, his Lordship, (though he had considerable doubts) thought the bill ought to be dismissed; if the plaintiff thought fit to wave any action at law against the defendant, without costs; if otherwise with costs.

In some cases it is important to examine whether the communications, which have taken place, do in fact amount to an agreement, because no person should be held to have in fact entered into an obligatory engagement without sufficient evidence, arising out of the circumstances of the case, of his intention so to do; and any acts which only amount to an intimation of intention shewing

at the same time that such intimation was not intended to have an obligatory effect, ought not to receive a more extended application. The case of *Tawney v. Crowther*, (o) before Lord Thurlow, involved an important question upon this subject, which it will be proper to refer to, although not directly applicable to the general subject of the present work. In that case, an agreement made between the parties was reduced into writing, but not signed; the defendant declaring that his own word should be as good as his bond. (p) The defendant, in answer to a letter reminding him of his expression, and urging the signing of the agreement, acknowledged that he had so said; that there was time enough before Michaelmas to settle ever thing; and repeated that his word should always be as good as any security that he could give. Lord Thurlow thought this letter sufficient to prevent the operation of the statute of frauds, and overruled a plea of the statute. Upon the case coming again before the court his Lordship, after expressing his opinion upon grounds irrelevant to the present purpose, that there was sufficient to satisfy the statute, added, "then, independent of the statute, if a letter now will bind the party, before the statute a parol agreement would have been binding. The question here is, whether there is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute: but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it. The defendant did intend by the letter to raise a confidence that the agreement should be performed. If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum*: but no doubt he meant to refer to the agreement which had been reduced into writing, and which he had carried away with him. It is argued that he took time till Michaelmas, not to complete the former, but to make a further agreement; it is true the conveyance was to be at Michaelmas. Then what are his words: 'My word shall be as good as any security

(o) 3 Bro. Ch. Ca. 318.

(p) This is a very proper feeling after an engagement: but, from numerous instances of the bad faith of parties which have fallen under my observation, assigning it as a reason

for refusing to enter into a written agreement, I would advise every person to regard such a declaration on such an occasion with extreme suspicion. MS. note by Sir W. D. Evans.

which I can give.' The signing the paper was the security pointed to. On the whole matter, therefore, he has agreed by writing to sign it. Several cases have been cited; and it has been argued that he declined to sign it. If he had said he never would sign it, he could not have been bound: but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it. If he said he never would sign it, he would not hamper himself by an agreement, it would be too perverse to admit it; but here, I am of opinion that the agreement must be performed." In *Foster v. Hall*, (q) Lord Alvanley alluded to the circumstance of the decree having been made by consent: but Mr. Lloyd and other gentlemen of the bar informed him, that though the terms were taken by consent, the point was adversely determined. Lord Redesdale also, in *Clinan v. Cook*, (r) observed that Lord Thurlow gave the defendant his costs, provided he consented to deliver up the possession within a certain time; and adds, "his Lordship (Lord Thurlow) was diffident of his opinion, and intimated that he did so to secure against an appeal." Mr. Eden, however, in his edition of Browne's Reports states that this fact, as related by Lord Redesdale, is not stated in the registrar's book, where costs appear to be given only to Morrell the trustee. In the same case of *Clinan v. Cook*, Lord Redesdale classes the case of *Tawney v. Crowther* (s) with the case of *Allen v. Bower*. (t) In the case of *Allen v. Bower*, the memorandum found amongst the papers of the lessor after his death was to the following effect: Whereas A. and B. have been at very large expenses in both their farms, which were greatly run out, and I know hurt them much in their circumstances, I desire they may not be raised in their rents on any account, as I have promised this order should be given by me, as not willing to grant them leases, which was reasonable for me to do, as I know full well the rent would not be paid for some years, the farms being so much out of order. I hope this will be duly observed by those in possession of my estates, as witness my hand this 10th day of October 1775. R. Bower." "In the first case," said Lord Redesdale, meaning *Tawney v. Crowther*, "where a man said he would not sign a paper, Lord Thurlow considered this tantamount to a signature; and in the latter, (*Allen v. Bower*) where the expres-

(q) 5 Ves. 718.

(s) *Supra*.(r) 1 Sch. and Lef. *ubi supra*.(t) *Ante*, 193.

sions of the party were, that he had not given his tenant a lease, because he was not willing to grant a lease, his lordship held this as an agreement to grant a lease. "I confess," continued Lord Redesdale, "my mind could never follow those two cases; and there were great many doubts amongst the bar on both of them."

In the abovementioned case of *Clinan v. Cook* Lord Redesdale said he should have had great difficulty if there had been any evidence of part performance: he must then have directed an enquiry, for the party had not suggested by his bill that the agreement was for three lives or any specific time, and the case stood both on the pleadings and evidence in an imperfect state on that head. This last point, how far parol evidence can in respect of part performance be admitted to supply a defect in a written instrument which upon the face of it was void for uncertainty, was not necessary to the decision of the case. The question also, whether an agreement for three lives or thirty-one years was such an uncertainty as to render the agreement void, did not necessarily arise, as there was no legitimate proof of the existence of an agreement to that effect; and the general question whether an agreement expressed in the alternative might not be valid so as to give an option to one of the parties was also very slightly alluded to, it being only said, that in the advertisement there was nothing which gave the choice to the tenant. The question whether such an agreement does not give an option to one of the parties, and if so, to which, still remains open to discussion; and if the tenant could not insist upon having the option himself, it would seem reasonable that he should have at least a claim upon the landlord for a lease for the one estate or the other according to his own option.

In the course of the discussion in *Clinan v. Cook*, a case (a) was referred to as an authority, that an agreement might be carried into execution, though no specific term is mentioned. In that case, however, no allusion was made to the point in question; and the note of it is too loose to be entitled to any weight as authority. The allegation of the bill was, that the plaintiff, a tenant for 11 years, agreed to lay out money in repairs if the landlord would enlarge the term to 21 years, or add fourteen years, or as

(a) Anon. 5 Vin. 522. pl. 28. ante 162.

many as the tenant should think fit. The landlord replied, they would not fall out about that; and afterwards declared that he would enlarge the term, without mentioning any term in certain. The performance was resisted on the ground of the statute; and it was decreed, in respect of part performance without any allusion, as far as appears, being made to the uncertainty of the duration of the term. If an agreement was made in the manner stated, there would be no great incongruity in admitting the tenant to claim such additional term as he thought proper within the limits of the particular periods expressly mentioned.

The case of *Hyde v. Skinner*, (v) as far as it goes, is an authority that upon a general covenant for renewal, contained in a lease for five years, the tenant might claim an additional term for 21 years, as being the time for which leases are usually made; and the same construction would probably have been applied to an agreement for a lease for an indefinite term: but Sir W. D. Evans adds, "I cannot think that such a doctrine would be now admitted at law in an action for damages, or be acted upon in equity in a suit for specific performance."

In the case of an agreement for the grants of leases for lives, it is equally necessary that the lives should be nominated. (x) If the parties are agreed as to which should name them, it ought to be done in a reasonable time; for a party cannot lie by as long as he pleases without nominating them, and then come for a specific performance, because the injury sustained by the lessor does not admit of compensation. (y) One case (x) appears to be an exception to this rule: that was an appeal from the chancery of the great session in Carmarthenshire. An agreement in writing had been made in 1800, between A. and B. for a lease to B. of a farm belonging to A. for three lives generally, without naming any lives in particular. C. purchased the farm from A. subject to the agreement, and received rent from B. who occupied under the agreement till 1808, when B. discontinued the payment of rent, because C. (who had not seen the agreement till 1807) refused to perform it. On a bill by B. for a specific performance, naming the lives of his three children, it was decreed in the

(v) *Supra*.

Beatt. 285.

(x) *Pentland v. Stokes*, 2 Ball. and Beatty, 68.

(z) *Kensington v. Phillips*, 5 Dow. P. C. 61.

(y) *M'Alpine v. Swift*, 1 Ball. and

court below accordingly. This decree was affirmed in the House of Lords with some variations as to the performance of previous conditions by the tenant. Lord Eldon observed, that the estate having been purchased subject to the agreement, the equity of the case was, that the agreement should have been made good at the time of the purchase; and although it was objected that the naming of the lives now rendered the performance a different thing (which was the case) from what it would have been if the lives had been originally named, yet it was clear that the parties were going on, as if the one had been entitled to a performance, and the other had been bound to perform, so that there seemed to have been mutual defaults. I have said these few words, continued his lordship, because I am anxious that this should not be understood as a decision; that under such an agreement as this a party may lie by as long as he pleases, and then apply for a specific performance. It is only under the particular circumstances of this case, taking it out of the general rule. The contract being to let for three lives at 140*l.* rent, certain repairs being first made in the terms of a covenant to that effect, Lord Redesdale observed, that the repairs must be first done, or otherwise the tenant would not be entitled to a specific performance; and the decree was so varied.

Where (a) there was a parol agreement in 1782 for a lease for three lives not then named, nor any stipulation as to which party should name them, at a certain rent: and the tenant entered and made considerable improvements in 1784 and 1785; and the rent being afterwards reduced in 1786, the tenant named the lives, one of whom was not in existence in 1782. The House of Lords thought the bill should be dismissed, although it appeared in evidence that the landlord approved of the lives named in 1786: but they said that no antecedent improvements could give effect to such a declaration; and if they could, the agreement in 1786 must be understood to be a different agreement from that in 1782.

It seems to have been admitted or taken for granted in some cases (b) that, upon an agreement for a lease for lives not named, the option of naming them within a reasonable time, belonged of right to the tenant: but in the last mentioned case Lord Eldon

(a) *Whedder v. D'Esterre* in Ireland,
2 Dow. P. C. 359.

(b) See Lord Redesdale in *Oberlinh
v. Hedges*, 1 Sch. and Lefr. 123.

expressed himself in a manner not consistent with that supposition; as in addressing the counsel for the intended lessee he said, "How would you argue in the court of chancery in the case of an agreement for three lives not specified, nor settled by whom to be specified? Would the court name the lives? Mr. Hart.—No. But if the names were afterwards pointed out and agreed upon by the parties. Lord Eldon. Could the court execute, unless it were alleged in the bill that they had agreed to the names?" This is all that past on the subject. In an early case, *Twiford v. Buckley* as reported in *Keble*, it might appear that the general question had been determined in favour of the covenantee: but, on reference to a report apparently more accurate, it appears that the right of nomination was specially reserved to the lessee. (c)

In the case of large properties the continuance of possession for a length of time, is usually a sufficient inducement to farming tenants to forego the examination of their landlord's title. But the speculations in land during the last thirty years, amongst other objections to fulfilling contracts, has raised much discussion on this point; without however coming to any very satisfactory conclusion.

An expression of Lord Mansfield upon the subject in question has been much more referred to in the course of subsequent discussions, than from its importance or its connection with the immediate question before him it seems to have deserved. In the case (d) alluded to the point decided was, that a lessee upon a lease made subsequent to a mortgage could not defend himself against an ejectment by the mortgagee, or require a previous notice to quit. In the course of the judgment Lord Mansfield said, "Whoever wants to be secure when he takes a lease, should inquire after and examine the title deeds. In practice, indeed, especially in the case of great estates, that is not often done, because the tenant relies on the power of his landlord: but wherever one of two innocent persons must be the loser, the rule is *qui prior est tempore potior est jure*." In the case of *Temple v. Brown*, (e) the counsel for the lessee with reference to this expression observed, that Lord Mansfield took it for granted, that a

(c) *Twiford v. Buckley*, 3 Keb. 183.
203. Cart. 205. S. C.

(d) *Keech v. Warner v. Hall*, Dougl. 21.
(e) 6 Taunt. 60.

person taking a lease had a right to inquire for and examine the title deeds. The court on the other hand said that there was no doubt of what Lord Mansfield said, that a person about to take a lease may refuse to take it, unless the lessor will satisfy him that he has a good title, just as any person may refuse to enter into any agreement whatever, unless upon the terms he shall prescribe.

In *White v. Foljambe*, (f) in which the question related immediately to a contract for an assignment, and which was decided upon its particular circumstances; the lord chancellor said, if ever it should be his duty to decide a question so important, he would not leave mankind to speculate upon any judgment he alone could give: but he would have the best assistance upon such a point; for he could hardly estimate the consequences of law from either doctrine. In *Temple v. Brown*, (g) the court of C. P. said, with reference to this opinion, that when Lord Eldon had said that he would not decide the point in equity, without the aid of the judges of the courts of law, the court would be sorry to take upon themselves to decide it without affording an opportunity for a review of their judgment. It is however by no means clear, that a court of law in deciding upon the strict question of legal right, and a court of equity in applying the discretionary authority of a decree for a specific performance, would necessarily come to a similar conclusion upon the point in question; and the distinction between the two proceedings is expressly adverted to in some of the equitable cases. In *White v. Foljambe*, the following incidental observations occur. "In the course of the argument of this case, propositions of great importance certainly have been discussed; and were contended for even to the length, that if A. agrees to take a lease for 21 years, or a building lease for 99 years, with a covenant to lay out money or subject to a ground rent, paying a large gross sum, according to the principles of this court, and the practice of conveyancing, the person agreeing to take the lease in that simple case has no right in equity to tell the lessor, before the contract shall be specifically performed, he shall shew his title to make the lease. It is so argued upon the ground that after the contract is executed it is not competent to the lessee, if evicted, to do more than to take such remedy as under the covenants to be contained in that lease he could have.

(f) 11 Ves. 337.

(g) 6 Taunt. 60.

The present case does not require me to say more upon that, than that I think there may be a very wide difference between the situation of a man who has thought proper upon his own examination of the lessor's title, or not examining it, or bargaining for indemnity, has been so foolish as to execute, and what a court of equity will do with reference to the specific performance of a lease not yet executed. As to the point, when it may be necessary to decide it, how far the lessee can call for a production of the title deeds of the lessor, it will be necessary to look into that before the general notion that he cannot call for that production can be shaken, if it ever can be shaken: it will be necessary to look back to the oldest cases to be traced from the case of feoffment with or without warranty, before we can say what should be the doctrine of a court of equity with analogy to the law"

The case of *Gwillim v. Stone*, (g) in the court of C. P., produced some discussion upon this subject, without leading, as Sir W. D. Evans conceives, to any important result. It was an action on the case, in which the plaintiff by the first count of the declaration alleged an agreement for a lease of premises in which he should expend 1000*l.*: that the defendant had not shewn, nor had, nor could have a sufficient title; that the plaintiff by permission of the defendant had entered upon the premises, and expended a considerable sum, and that he had been deprived of great advantages which he would have had from granting the lease. The second count averred an undertaking to deliver an abstract in a convenient time. The agreement proved was a mere agreement for a building lease. The plaintiff began to make foundations and other works, during the progress of which it was discovered that a part of the premises contracted for belonged to the owner of the adjoining land. The defendant filed a bill for specific performance, or that the agreement might be delivered up to be cancelled. The master of the rolls referred it to the master to enquire whether the plaintiff in equity, (the defendant at law) could make a good title to the premises; and, if not to the whole, whether the deficiency was essential. The master reported, that he could not make a good title to any part of the premises: the court refused to give any compensation to the defendant in equity for the expense he had incurred; but gave him liberty to bring

any action at law to which he might be advised. Some stress was laid upon this permission in the argument at law: but it is clear that nothing could be more unnecessary than such a reservation; or that the defendant, the bill against whom had been dismissed, might without any special leave bring such actions as he thought proper. To return, however, to the case at law, a verdict was obtained for the plaintiff with nominal damages, with liberty for the plaintiff to move for a rule to increase the damages to the amount of the sums expended: and also with liberty for the defendant to move for liberty to enter a nonsuit: both rules were discharged, the court being of opinion that the plaintiff, who had entered before obtaining the lease, was not entitled to a compensation for his expenditure, and also holding that as the plaintiff had proved the allegations in the first count of the declaration, the defendant was not entitled to a nonsuit: but the judgment was arrested on account of the breach alleged being more extensive than the agreement declared upon would warrant. Upon this part however of the case the report is extremely indistinct. The following observations of Mr. J. Lawrence appear to have been regarded with undue importance in the case immediately following; "The averred agreement to make a good title certainly is not expressed in the contract; and as to the agreement alleged in the second count to deliver an abstract, it is all poetry, the mere fancy of the special pleader: there is no trace in the evidence of any such contract. I have always understood, that in purchases of land the rule is *caveat emptor*: the extent of the plaintiff's loss can make no difference." *Chambre J.* "We cannot consider the agreement as equivalent to a covenant for title in an absolute conveyance." The marginal abstract of this case, observes Sir W. D. Evans, like most other marginal abstracts in the same work, goes much further than the decision of the case itself appears to warrant. It is expressed in these terms: "An agreement to grant a lease contains no implied engagement for general warranty of the land, nor for a delivery of an abstract of the lessor's title." And as the marginal abstracts collected into general indexes form a great part of the law on circuits, it is very important that they should not state any doctrine in stronger terms than the decision of the case necessarily requires. If the decision in arrest of judgment does go the length supposed, *viz.* that a party agreeing to grant a lease is not answerable for a breach of contract;

although it expressly appears that he had no title to the premises, or what at law is the same thing to part of the premises, it certainly goes much beyond the point at present under examination: but it would be very detrimental if such loose *dicta* as have been cited should have any material influence upon a question of such general importance.

In the subsequent case of *Temple v. Brown*,^(h) the plaintiff had contracted for a lease of 21 years in consideration of 600*l.* and an annual rent, and paid a deposit of 32*l.* The defendant having refused an abstract of title, the action was brought upon the special agreement, as well as upon the count for money had and received, to recover the deposit. Gibbs, C. J. at *Nisi Prius*, holding upon the authority of the preceding case, that the plaintiff was not entitled to demand an abstract, and therefore could not even recover his deposit, directed a nonsuit. Upon an application to set aside the nonsuit, Heath, J. instanced the case of a lease for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was a mere tenant for life; but assumed to have the power of leasing and receiving fines to the amount of 29,000*l.* Nevertheless it had never been yet heard of that a tenant for life was asked to shew his title to lease. Upon which Sir W. D. Evans observes, "it is very certain that many leases have been granted without authority or enquiry upon a mistaken confidence in the lessor, and that thereby many honest purchasers have been seriously cheated: and perhaps the production of the title, if required, would generally be refused; but this decides nothing as to the legal question." After the argument of the case, the court seeing that it was a question of immense magnitude, (which in *Gwillim v. Stone* seems never to have been thought of) at first asked whether the parties would put it on the record in the shape of a special verdict, throwing out the observations which had been cited from the cases of *Keech v. Hall* and *White v. Foljambe*: but afterwards considering that the case had originated in a dispute between the two attornies, and that the clients had nothing to gain by the decision of this momentous question, they desired the counsel to consider what course would be most for the interest of the parties, and adjourned; in consequence of which the case was never afterwards argued. Under such cir-

(h) 6 Taunt. 60.

cumstances, the marginal abstract in this case seems to be a conclusion beyond the premises in stating "semble, that the owner of land, in agreeing to grant a lease, does not thereby impliedly engage that he has a good title to the fee-simple, and that he will deliver an abstract."

In *Fildes v. Hooker*, (i) Sir W. Grant came to an express decision, that a specific performance could not be decreed against the intended tenant upon an agreement for a lease at rack-rent, without shewing a complete title in the lessor to grant what he contracted to grant; rather intimating his opinion, that the lessor could not in such case be compelled to shew his title upon a bill by the lessee, and leaving open the question upon long terms with fines or expenditure. In that case the landlord shewed a title under a lease granted by the Skinners' Company a few years before: but no title in the Skinners' Company as ground landlords. With regard to the general doctrine upon the subject, the report is as follows:—Sir W. Grant, "I should regret much to be under the necessity of determining some points that have been touched upon in argument in this case. I should hesitate long before I decided that an owner of real property does by contracting to grant a lease become bound to shew a title to the estate out of which it is to be granted. But it is quite a different question, whether one who is enabled, or thinks it inexpedient to shew a title to the property to be leased, shall have a right to compel another to take a lease of such property, without any other security for the enjoyment of it than the personal covenants into which the lessor commonly enters. There are many cases in which this court will not interfere in favour of a plaintiff, except upon terms which could not be directly enforced against him in the character of defendant. Whether the interest contracted for be freehold or leasehold, it seems reasonable that he who comes for a specific performance should be prepared to shew that he is able to give what he seeks to compel a purchaser to take. What is contracted for is, not merely a piece of parchment containing certain covenants: it is an interest in the land which is agreed to be given him. And is this court to tell the defendant, he has no right to inquire whether the plaintiff has any interest to give? It would be quite new for a court of equity to enforce a perform-

(i) 2 Meriv. 424.

ance on one side without examining whether there be a capacity to perform on the other."

It was hardly contended as (j) a general proposition, that a court of equity would so act with respect to leasehold interests of every description. But it was attempted to make distinctions. It was said the agreement here is for a lease for only 21 years, and at a rack rent; and therefore the case is to be considered differently from one in which a long term is to be granted, or a large fine is to be paid, or expensive improvements are covenanted to be made. But it may be a great inconvenience and detriment for a lessee for 21 years to be evicted in the middle of his term. That which at the commencement of the term was a lease at rack rent may, from various circumstances, become a beneficial interest before the end of it. The thing contracted for is not a precarious enjoyment from one year to another, but an absolute term for 21 years, of which the value depends on the certainty of its duration. I do not therefore see, (observed Sir W. Grant) why a person bargaining for such an interest should be compelled to take it without a title. It was with regard to a rack rent lease for seven years that Lord Mansfield said it was the tenant's fault that he did not look into the title: yet a court of equity is to say that he is bound to take the lease without looking into the title. But then it has been said, that in this case the tenant will have as good a title as with reference to the nature of the subject can be reasonably required. There may be cases in which as from length of possession a strong presumption exists, though no actual title can be shewn: I leave all such cases untouched. But here there has been only two years' enjoyment at the time the contract was entered into; nor has there even now been such a length of possession as would suffice to raise a presumption of title. To say that the purchaser must be contented with such a title would be to say, in other words, that he has no right to require any title whatever. Then it is said that property of this kind would be rendered completely inalienable: but no such consequence would follow. The only consequence would be, that when the owner is unable or unwilling to shew a title, he will say so upon entering into the treaty. He can have no motive for his silence: but the expectation of getting a better price than might possibly be given, if his actual intention to produce no title were previously de-

(j) *Fildes v. Hooker, supra.*

clared. The objection therefore to taking the lease without shewing a title in the ground landlord was allowed: but an opportunity was given of shewing such title, if the party had any serious intention, or had been able to do so.

It is not however necessary in all cases that the inability of the lessor or the vendor of a leasehold estate, to shew the title, should be the subject of express stipulation in the previous agreement: for it has been held sufficient to repel the objection, if such a purchaser has notice of the inability at the time of entering into the contract, which notice being a collateral circumstance, and not a part of the contract itself, may be proved by parol or extrinsic evidence. (*k*) In a late case it was held that a man, after having made a voluntary settlement, could not compel a purchaser to take his title. (*l*)

Equity will not decree a specific performance against a party not competent to execute the contract; neither will equity decree a performance where a party cannot grant a lease upon the terms agreed upon; for, according to the principle above stated, the party applying for relief must shew that he is applying for what the defendant is competent to do. Therefore equity cannot decree a specific performance where the agreement is for an absolute demise, and the lessor cannot bind the inheritance, (*m*) although the lessee agree to take a qualified lease. But it is not necessary that the lessor should have a good title at the time of the agreement; it is sufficient if it be good at the time of making the lease. (*n*)

If a tenant for life, with a power to lease for twenty-one years or three lives, agrees to grant a lease for thirty-one years, it has been held that he is bound to grant only such a lease as is warranted by his power; (*o*) yet where tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, with the same provision for renewal on the death of any person to be named in a future lease; this was held to bind him to a specific performance, although he exceeded his power, if a life dropped in the life of the lessor. (*p*)

(*k*) *Ogilvie v. Foljambe*, 3 Meriv. 53. *Bayly v. Tyrrell*, 2 Ball. and Beatt. 358.

(*l*) *Smith v. Garland*, 2 Meriv. 123.

(*m*) *Harnett v. Yielding*, 2 Scho. and Lefr. 556. *Ellard v. Lord Llandaff*, 1 Ball. and Beatt. 245. See Doe

v. Butcher, Dougl. 52.

(*n*) *Langford v. Pitt*, 2 P. Wms. 630. *Brown v. Warner*, 14 Ves. 156.

(*o*) *Byrne v. Acton*, 1 Bro. P. C. 186. Toml.

(*p*) *Taylor v. Stibbert*, 2 Ves. J. 437.

A contract for a lease by a mortgagor cannot be enforced against a tenant without obtaining a reconveyance of the estate, or procuring the mortgagee to confirm the lease. On the other hand, the tenant holding under such a contract cannot compel the mortgagor to pay off the debt in order to give effect to his contract. (r)

In the case of *White v. Foljambe* (s) a bill for specific performance was dismissed, the plaintiff's title having been described as being fifty years, the residue of a long term, free from incumbrance: and it turned out that there were only a few years of an old term, and a reversionary term from another lessor; and old incumbrances were not shewn to be discharged. In a court of law also it has been held (t) that where A., who was in arrear for rent to his landlord, agreed to underlet his house to B., the latter paying for the furniture at an appraisement, B. was excused the performance of the agreement, as the furniture was liable to be distrained for the rent in arrear. Where, upon a considerable estate, there is only a small incumbrance, there may be some room for an indemnity: but where a judgment amounted to half the purchase money of an estate, it was held that a purchaser could not be compelled to take it. (u)

In a case (x) where a lease had been made for sixty-one years, and it was covenanted that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the said premises to the said lessee, for the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c.; and so in like manner, at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted, &c. It was held at law that the lessee could not claim a further term of twenty years at the expiration of the last twenty years of the lease, if he had omitted to claim a further term at the end of the first and second twenty years in the lease; because it was an agreement

(r) *Costigan v. Hustler*, 2 Scho. and P. 172.
Lefr. 160.

(u) *Wood v. Bernal*, 19 Ves. 220.

(s) 11 Ves. 337.

(x) *Rubery v. Jervoise*, 1 T. R. 229.

(t) *Partridge v. Sowerby*, 3 B. and Qu. as to relief in equity?

depending on a condition precedent which had not been performed.

A court of equity cannot give relief in cases in which a condition precedent has been annexed to a power, and the condition has not been performed, or has become impossible : (y) for this in effect would be to create a power. Neither can equity relieve against the breach of any condition precedent where the damages are contingent, and not to be estimated : but it is the province of equity to relieve against accidents. Therefore, on a renewal where there was a proviso in the old lease, that in case more than one of the *cestuis que vie* should so marry new lives should be named in their stead, and one of the *cestuis que vie* left Ireland, and it could not be ascertained whether he was dead or not : this was held to be such an accident as equity would relieve against. (z)

In *Dowling v. Mill* (a) a lease was made by A. in 1777 for years, determinable upon lives, with a covenant for a renewal in case of the death of any of the lives, on payment of 20*l*. In 1790 a life dropped. A., in consideration of 20*l*., granted another lease with a similar covenant of renewal, on which a memorandum was indorsed by his son (the defendant) being next in remainder, in the following words : " I, C. M., son and heir apparent of the within named Sir C. M., do hereby give my free consent to the grant of the within written indenture of lease, and the premises therein mentioned. Witness my hand the day of the date within mentioned." The defendant was willing to grant a lease, but without containing a further covenant for renewal. The plaintiff insisted upon the right to such a covenant : but the vice-chancellor held that the indorsement constituted no legal obligation. His honour said, " There was no consideration given to the defendant for his indorsement : his father was bound to grant a new lease, if required to do so within a given time, and on the payment of a fine of 20*l*.; and the father received the 20*l*. The defendant does not claim through his father ; and the covenants and obligations do not bind the defendant who is the remainderman : there is no mutuality in the remainderman—no covenant—no parties—no engagement. It has been said that, by signing this memorandum, the defendant induced the lessee to suppose he

(y) *Mansell v. Mansell*, Wilm. Rep. 36. Reg. Book, fol. 504. 1756. Lord Kensington v. Philips, 5 Dow. F.C. 61. (z) *Sweet v. Anderson*, 2 Bro. P. C. 257. Toml. (a) 1 Madd. Ch. Ca. 341.

should have a new lease at the end of the term ; and therefore it is now fraudulent in the defendant to disappoint the expectations he had raised : but there is nothing in the lease shewing such an expectation ; and if any such idea had been obtained and encouraged, the lessee would have procured the defendant to join in the lease, instead of which he first takes the lease, and then gets this memorandum, which must be construed according to the words of it, and amounts merely to a voluntary consent to the lease. No case is made which warrants the decreeing what is paid by the bill.

But in the case of *Crofton v. Ormsby*, (b) where a lessee for lives being about to marry, and being desirous to have the life of his intended wife inserted in the lease instead of the *ceteris que vic*, for the purpose of having the premises settled upon her, wrote to the landlord and the remainderman, requesting that such a change might be made ; to which they returned an answer, expressing their assent, and a settlement was made, and the marriage took place accordingly. Lord Redesdale thought that, independently of the circumstance of the marriage, there was a valid agreement, although the decree was chiefly upon other circumstances. On this part of the case his lordship said, " That the remaindermen should have considered the transaction binding in point of honour one cannot be surprised : but I conceive it was clearly binding on him in a court of justice ; for the fact was, that he wrote this letter to procure the marriage of the lessee with this lady, which could not have taken place without the provision he sought to make. This, therefore, is to be taken to be an act done by them to procure the marriage they induced by this act ; they (the remainder men) became therefore in some sort parties to the marriage contract. They promised this to Crofton ; and authorised him to propose it to the lady and her friends ; and he did so : the consequence is they are clearly bound and could not retract. Accordingly, they never attempted to do so."

Agreements for leases will be binding on the assignees of a bankrupt or insolvent lessor ; and if the lessor take the benefit of an insolvent act after bill filed for a specific performance, the assignee must be made a party by a supplemental suit. (c)

(b) 2 Scho. and Lefr. 583.

(c) *De Miacz Witz v. Udney*, 16 Vcs. 446.

Agreements for leases, as well as covenants for renewal, will bind the purchaser of the inheritance, but not without notice; and the assignee or personal representative of the lessee will also be entitled to the benefit of them. (d) So where there was a covenant with A. and his executor to renew by making a lease to A. and his assigns, the executor was held to be an assignee within the covenant. (e)

So where (f) C., being about to marry, applied to his landlord to change a *cestui que vie* in his lease, by inserting in place of the old life the life of his intended wife, which A. by letter promised to do; and upon the faith of this promise the marriage took effect, and the premises were settled on the wife. Upon a bill by the wife, after the death of C., a purchaser of the estate from A. being deemed to have notice under the circumstances, was decreed specifically to perform the agreement.

So also it has been determined (g) that a purchaser from tenant in tail, with notice of an agreement by him to renew a lease which the father tenant for life had covenanted to renew is bound to renew. Lord Hardwicke said, "Although a tenant in tail is not bound by the covenant of his father; yet, as the party in this case was entitled to his father's estate, whatever assets his father left, real or personal, would have been liable to the covenant; and if so, the agreement was not without sufficient consideration, and consequently would bind the person who takes with notice of the obligation, which the tenant in tail had laid himself under."

Notice to an agent is notice to the party himself. (h) So where (i) A. agreed to take a lease of certain premises, but previous to signing the articles had notice of an agreement with B., and disregarding such notice procured a lease to be made to C. his son; it was held that this notice to the father affected the son; and, the prior agreement being established, he was decreed to deliver up the premises.

In some cases, although a decree for a specific performance

(d) *Hyde v. Skinner*, 2 P. Wms. 196.
Richardson v. Sydenham, 2 Vern. 447.
Isted v. Stoncley, 1 And. 82. *Finch v. The Earl of Salisbury*, *Finch Rep.* 212.

(e) *Chapman v. Dalton*, *Plow.* 284. a.
 (f) *Grofton v. Ormsby*, 2 Scho. and

Loft. 583.

(g) *Earl Brook v. Bulkeley*, 2 Vez. 498.

(h) *Blenkarne v. Jennings*, 2 Bro. P. C. 278. by Toml.

(i) *Coote v. Mammou*, 5 Bro. P. C. 353. Toml. *Merry v. Abney*, 1 Ch. Ca. 28.

cannot be obtained, the Court of Chancery will effect by injunction the purpose of substantial justice. Therefore, where (*j*) a joint stock company established by act of parliament purchased an estate, pending a suit against the vendors to compel the specific performance of an agreement to grant a lease of part, on a bill by the vendees against the treasurer and directors, the plaintiffs were declared entitled to a lease; and the treasurer, being the person in whose name actions by the company were authorised by the act to be brought, was restrained from disturbing their possession, though the other proprietors were not parties: but it was held that no decree could be made for the execution of a lease. The master of the rolls said that it was clear, that between party and party there could be no defence, a purchaser *pendente lite* being bound as much by a contract as the person who originally entered into it. But the question here was, whether there was not a defect of parties to the suit. After stating the exception made in certain cases to the rule, that all parties interested should be before the Court, his honour said that it was quite clear the present suit had sufficient parties, and that the defendants might be considered as representing the company. Can I then dismiss the bill for want of parties, because all the proprietors, *admitted to be* so numerous that it is difficult to find them, are not before the Court? There is no fair distinction between this case and those which have been stated. The only novelty is that the bill requires an act to be done by the absentees. Not having them before the Court, though their rights may be bound, there is a difficulty in making them act. The plaintiff requires specific performance of an agreement; and it would be hardly sufficient, supposing it proper, for a few to execute on behalf of the rest. In a conveyance of the interest all must join. But that difficulty presents no objection to binding the rights of the parties not before the Court. That is authorised by every one of the laws referred to. If the Court cannot compel the defendants to do the act required, it must go as far as it can.

In *Steed v. Cragh* (*k*) a husband seised in right of his wife of a term of years, made an underlease for ten years; and, upon borrowing money of the lessee, covenanted to grant him another lease after the end of the former ten years, to continue as long as he had any

(*j*) *Meux v. Maltby*, 2 Swanst. 277. (*k*) At the Rolls, 9 Mod. 42.

right, but died before he had made any such lease; it was decreed to be a good disposition of his term in equity. When, however, the general question came before Lord Eldon in *Druce v. Dennison*, (l) he stated that he was disposed to decide the cause upon a ground that did not make it necessary to determine this point: but his lordship stated that, if the cause should be reheard on the point upon which he decided it, he should wish a search to be made upon the point, whether it had ever been decided that an agreement will or will not bind the wife; and if it will, whether the rent is to be paid to her or *her husband*. If that is untouched by decision, he thought it would be found the analogy to other cases would make out that an assignment in equity is to this purpose as good as an assignment at law: but he said that, without prejudice; "the principle is stated," his lordship added, without saying any thing as to the authority of the case, towards the conclusion of *Steed v. Cragh*. Sir W. D. Evans conceives that the question would now be considered as concluded, by the decision in the case of powers which will be next mentioned.

It has been already observed, that an agreement by tenant for life to grant a lease in pursuance of a power, is a good execution of the power in equity. The tenant for life must make a contract of some kind before he makes an occupation lease: if that is to be subject to the uncertainty of not being carried into execution, if the tenant for life should die in the mean time, it would be disadvantageous to the letting of estates under such powers, which are expressly created for the benefit of the estate. In the case of *Campbell v. Leach*, (m) Lord C. J. De Grey is reported to have said, "As to the lessee's power of enforcing the contract against the remainderman, this is a new point; but though new, I think upon principle it ought to be enforced. The ground of the objection is, that the remainderman is neither party nor privy to the lease, which would hold in the case of a bare tenant for life: but under the power of leasing there is a referrible privity given by the settlement, and such a tenant for life has a qualified power to bind the remainderman." Lord C. B. Smyth also agreed, that the remainderman was bound by the act of the tenant for life. Lord Redesdale, therefore, in *Shannon v. Bradstreet*, (n) decided on

(l) 6 Ves. 385.

(n) 1 Scho. and Lefr. 59.

(m) Ambl. 749.

the authority of this case, that an agreement to grant a lease by tenant for life, with leasing power, might be specifically enforced against the remainderman. It seems likewise that the obligation is mutual, and that the remainderman may enforce the contract of such a tenant for life. In the case of *Campbell v. Leach*, (o) indeed, Lord C. J. De Grey is reported to have added, to what has been already cited, these words: "And I do not know that the remainderman could on his part enforce the contract of such tenant for life. I had at first some doubts upon this point, but own myself satisfied by what was said in answer." But Lord Redesdale said he suspected these additional words were never uttered by Lord C. J. De Grey: but, if they were, he thought they might have been suggested by the case of *Stamford v. Ormby*, (p) which was compromised. Mr. Sugden has shewn strong grounds for supposing the word "not" is omitted by mistake in the passage alluded to.

The agreement however to bind the remainderman must be a clear explicit written agreement, such as in common cases would be an unimpeachable agreement, both with reference to the statute and general principles of equity. (q) In a late case therefore, where the agreement did not contain some of the material terms of the lease, which was a building lease, merely specifying the rent and the term, without even mentioning the time for its commencement, it was held not binding. A parol agreement in part performed might raise a different question: but it appears that the remainderman would be protected by the statute, though the tenant for life would not; for the party himself is bound by a part execution on the ground of fraud, which is personal. Such a ground could hardly be made to apply to a remainderman, unless money has been expended, and there has been an acquiescence after the remainder vested.

In a case (r) where a tenant for life with power to make leases by the consent of the trustees, without taking any fine, entered into a contract for a lease with a person who had notice of the nature of his title, and a consideration was to be given for such lease under colour of giving double value for the stock, the trustees not concurring, it was held by Lord Redesdale that the

(o) *Supra*.

237.

(p) See Sugd. Pow. 365, 3d edit.

(r) *Lawrenson v. Butler*, 1 Scho.(q) *Ellore v. Sutton*, 3 Meriv. Ch. Ca. and Lefr. 13.

proposed lessee could not compel the tenant for life to execute a lease which should be void, as against the parties entitled in remainder under the settlement for want of mutuality, as the lessee could not on his part be compelled to accept of a lease so qualified, no act being here done in pursuance of the agreement. The following extract comprises his lordship's view of the general doctrine upon the subject: "I confess I have no conception that a court of equity ought to decree a specific performance, in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance according to the advantage which it might be they were to derive from it: because otherwise it would follow that the court would decree a specific performance, when the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance of it, and yet if advantageous to him he could not compel a performance. This is not equity, as it seems to me. If indeed there was a concealment or ignorance of the facts on the one part, and that thereby the other party was led into a situation from which he could not be extricated, then he would have a right to have the agreement executed *cy pres*; that is, a new agreement to be made between the parties. Now it is not and could not be contended in this case, that the defendant could have a right to enforce this agreement: for he could enforce it only according to the terms of the agreement, and these he cannot perform on his part for want of the trustees' consent; and the court could not say to the plaintiff, You shall forego a part of your agreement."

It seems to be clearly settled that the owner of the inheritance may make leases with covenants for perpetual renewal, each renewed lease to contain a covenant to renew for ever. But such covenants in equity are viewed with an unfavourable eye, and are construed strictly in favour of the lessor, and those claiming under him. They must therefore be worded in plain and unambiguous terms, so that there may be no mistake about the interest purported to be granted. A covenant to renew, for example, under the same covenants as in the original lease has been held not to include a covenant for perpetual renewal,

because it did not necessarily imply a covenant to renew more than once. (1)

The construction of such covenants is the same both at law and in equity; and neither at law nor in equity can they derive any validity from any circumstance beyond their express and unequivocal meaning. (u) It was indeed a part of the case of *Furnival v. Crew* (x) before Lord Hardwicke, that both the leases in that case had been twice renewed, and that each of the renewed leases contained the same covenant for renewal as the original lease, from which Lord Hardwicke inferred it to be the understanding of the family, that it was a covenant for perpetual renewal. So also in *Cooke v. Booth*, (y) which was sent to a court of law by Lord Bathurst, the case was decided partly on the ground of an allegation, that such a covenant had been uniformly inserted in every lease for a long period of years. But this last case has been strongly disapproved; and subsequent judges have declared that it is not possible to introduce any fact of this kind upon the record, so as to influence the construction which the covenant would otherwise bear from a fair interpretation of the words; which rule applies to courts of equity as well as courts of law.

In *Bridges v. Hitchcock*, (z) the covenant was to grant such further lease as the lessee should desire under the same rents and costs; and it was considered not unfair to infer, that he that might have asked for a lease for any number of years, did not exceed what was intended by requiring one with a covenant to renew.

In *Furnival v. Crew*, (a) besides the fact already mentioned, it appears that the words of the covenant were "one or more leases, and so to continue the renewing such lease or leases," which according to the printed report Lord Hardwicke relied on as plainly importing a repetition of renewals. Moreover there were fines to be paid at every renewal at the option of the lessor, so that the covenant for perpetual renewal was not open to the same objection as in most other cases.

(1) <i>Hyde v. Skinner</i> , 2 P. Wms. 196.	N. R. 449. 7 East, 227. Harg. Jurid.
<i>Tritton v. Foote</i> , 2 Bro. Ch. Ca. 636.	Arg. 411.
<i>Russell v. Darwin</i> , <i>ib.</i> 638. <i>Reece v.</i>	(x) 3 Atk. 83.
<i>Lord Dacre</i> , <i>ib.</i> note. <i>Harnett v.</i>	(y) Cowp. 819.
<i>Yielding</i> , 2 Scho. and Lefr. 557.	(z) 1 Bro. P. C. 522.
(u) <i>Iggulden v. May</i> , 9 Ves. 325. 2	(a) <i>Supra.</i>

The case of *Moor v. Foley*, (b) is clearly distinguishable from the rest. There the lessor covenanted to renew under the like rents, covenants, and conditions; and further stipulated with regard to the covenants to be inserted in the new lease, that in such grant it should be covenanted and agreed that a new lease should be granted under the same rents, covenants, and provisoes, upon the event happening which was therein mentioned: so that this express stipulation prevented any necessary implication from general words of a covenant for perpetual renewal; because, if the parties had intended a covenant for perpetual renewal, they would have expressed their intention in larger terms.

Under a devise of seven different estates to a sister, brother, and nephews respectively, one to each stock, including, as to six of the estates, three several lives in succession on each estate; and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power to add another life or lives to make three in like manner as a power after mentioned for other persons to do the same; and then giving this general power; viz. that when and so often as the lives on either of the estates before given should be by death reduced to two, that then it should be in the power of the persons then enjoying the said estates to renew the same with the reversioner, by adding a third life, and paying the reversioner two years' purchase; and also to exchange either of the said two lives on paying one year's purchase. It was held that this power of renewal only authorized the addition of one life to the share on each estate, and of making one exchange of a life. (c)

Equity will not decree a specific performance of a covenant or agreement, where it is become unconscientious to perform it, except on the terms of the plaintiff submitting to a conscientious modification of it. In the case of *Davis v. Hone*, (d) it appeared that the dean and chapter of Christ Church, Dublin, being seised in fee, demised certain premises about 150 years before the present cause to A. for 21 years at a certain rent. Shortly after A. demised the same lands to B. for 16 years at an increased rent, in which underlease there was a covenant from A.; that he, his executors, administrators, and assigns, should and would sometime before the end and expiration of the first seven years of the said

(b) 6 Ves. 232.

10 East, 549.

(c) *Doe d. Hardwicke v. Hardwicke*,

(d) 2 Sch. and Lef. 341.

lease, from the dean and chapter, or at any time sooner, as also at or sometime before the expiration of the first seven years of every future lease, that should be obtained by him or them of the demised premises, or at some time sooner, make all proper application, and use all proper endeavours with the said dean and chapter for a renewal of the said lease, and of every future lease which should be obtained as aforesaid; and that on obtaining such renewal or new lease by the said A., his executors, administrators, or assigns, he or they should within six months after his or their giving notice of such renewal to the said B., his executors, administrators, or assigns, at the request and costs of the said B., his executors, administrators or assigns, renew by adding so many years to the term as should be obtained from the said dean and chapter, the said B., his executors, administrators or assigns, accepting such new lease, and surrendering the old one within six months, and paying the sum of 300*l.* as a fine when seven additional years should be added, and so in proportion, and also paying double the yearly rent and no more, that should be reserved by the said dean and chapter. And B. covenanted to pay such rent and fine, stipulating, that in case upon any future renewal the said B. should apprehend the yearly rent to be too much advanced, it should be at the election of the said B., his executors, administrators or assigns, to accept the renewal, or to refuse the same; and to hold for the residue only of the unexpired term. The dean and chapter continued to renew every seven years without any increase of rent, and the representatives of B. also continued to renew upon the terms of the covenant. In 1796, the septennial fine was very much increased by the dean and chapter, and the under-tenants consented to contribute more than the 300*l.* stipulated by the covenant, on having two years and a half added to their lease; and a lease was executed to that effect, containing the covenants in the original lease, and particularly that for renewal. In 1801, A.'s representative sold his interest to C.; and when the usual time for renewal came, C. entered into a treaty to renew with the dean and chapter at an increased rent: but, upon the tenant insisting that they had always renewed at an increased fine and not rent, and had expended large sums of money, a bill was brought to compel C. to renew at an increased fine, offering to pay the fine on their interest being renewed to them. Lord Redesdale said, that the court ought not to give

specific performance according to the letter of the covenant, because it would be unconscientious in consequence of the change of circumstances, nor could the plaintiffs lose their property altogether; they might have a conscientious modification of it specifically executed. Here, for 150 years from time to time, all the persons interested in the property made themselves parties to the abuse of the power of renewal, by continually increasing the fine, and not the rent; and all the improvements have been made on the faith of the continuance of such an abuse. Much property in Ireland was in similar circumstances; and in 1795 the legislature legalised the abuse by the stat. 35 Geo. III. c. 23., the motives to which must have been old practice, and the injustice likely to be produced to individuals by a strict execution of the law as it stood previously. After the passing of this act, a difficulty arose in the minds of the parties, and the under-tenants paid part of the fine beyond the stipulated sum on having a new lease executed to them: but the old covenant for renewal was inserted. The insertion of this covenant, the court observed, was improvident: for by the strict words the lessor might be deprived of the whole benefit he derived under the lease; and the tenants, by not coming to terms for future rents, might greatly endanger their interest. The order drawn up was to the following effect: that the plaintiffs should be at liberty to renew the lease at their own expense in the name of the defendant, or in the name of a trustee to be named by the plaintiffs, and approved by the master: the plaintiffs consenting to pay the whole fine and fees, and also consenting in case such lease should be renewed in the name of the defendant to accept of covenants for renewal in their underlease with these variations, namely, that the whole fine and fees should be paid by the lessees, provided that the rent to be reserved on such underleases should not exceed the clear rent now paid over and above the rent payable to the dean and chapter. The case was carried to the House of Lords, who affirmed the decision.

In ordinary cases the same modification will not usually be made, because in general the party may provide for any contingency by his covenant. Therefore where (c) A., holding under a corporation of which he was a member, and being in the habit of renewing on favourable terms, demised to B. at a certain rent, with a covenant

(c) *Evans v. Walsh*, 2 Scho. and Lefr. 519.

to renew at the same rent as often as the corporation should renew to him, and the corporation at length raised the rent payable by A.; it was held that A. was bound nevertheless to renew on the former terms, because he might have provided for it by his covenant. So in another case (*f*) a renewal was decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee, because he had covenanted with him that, as often as the bishop should renew, he would renew the underlease without fine.

Here it should be observed that it is usual and perfectly reasonable, that the underlessee should contribute to renewal fines in proportion to the quantity of his estate: provisions therefore of this nature are generally introduced into underleases of church lands. (*g*) Indeed, where (*h*) a lessor agreed to demise for a longer term than he himself was possessed of, and to carry the agreement into effect; he covenanted that he would endeavour to procure such renewals as would enable him to renew for the full term agreed upon, the lessee paying a proportion of the renewal fines; it was held that there was an implied agreement that the lessee would take such renewal without an express covenant to do so; and consequently that the lessor had a right to call upon the underlessee to declare whether he would renew or not.

In the case of the City of London *v.* Mitford, (*i*) the lord chancellor refused to decree a specific performance of a covenant for perpetual renewal under the circumstances. It had been provided by the original lease that if the lessees declined taking a new lease of the premises, they should not only leave them in good repair, but convey to the lessor, his heirs and assigns, certain lands and buildings between the demised premises and the river Thames. These last mentioned lands had been since converted into the highway leading to Blackfriars bridge. Specific performance was refused of the covenant to renew, because it would be impossible, if the lessees should at any time refuse to renew for them, to perform their part of the covenant.

(*f*) *Revell v. Hussey*, 2 Ball. and Beatt. 280.

(*g*) *Charlton v. Driver*, 2 Brod. and B. 345.

(*h*) *Lord Frankfort v. Thorpe*, 2 Ball. and Beatt. 372.

(*i*) 14 Ves. 41.

In *Heard v. Wadham*, (i) Abbott (being counsel for the defendant) cited the case of *Pinche v. Curtis*, 4 Bro. Ch. Ca. 329. adding, that in equity a specific performance will be decreed after the time agreed upon by the contract; but that is where the other party acquiesces. Lord Kenyon thereupon observed that the practice of the Court of Chancery was much altered of late years; for that now that court would not entertain a bill for a specific performance to compel a vendee to make good his purchase if no conveyance were tendered to him within the time stipulated by his contract, unless it were shewn that he had waived that stipulation. This opinion of Lord Kenyon is conformable to all the modern decisions on the subject. (k)

The doctrine of laches has been chiefly agitated in the case of sales, it having been at one time held that the time appointed for the performance of the agreement for purchase was merely incidental; and that it could not, so far as regarded the question of specific performance, be made an essential condition of it even by express stipulation, a doctrine which has in many cases been attended with the greatest hardship and injustice. (l) The cases on leases in which the same doctrine has been considered are not many. In *Wingfield v. Whaley* (m) the Court of Chancery in Ireland had decreed the specific performance of an agreement to grant a tenant a further term at the expiration of his subsisting lease. One ground of appeal was that the contract, if any such existed, had lain dormant for many years, and was never insisted on by the person with whom it was supposed to have been made. It was answered that the agreement was not to be performed till May 1714; and that, within five months afterwards, the respondent exhibited his bill for a discovery of it, not having then found the same: but that the inconsistency could not be wondered at, when it was observed that the person who was party to it was complained of for not insisting on the performance of the contract, though he had been dead eight years before any one could or need have insisted upon it. The decree was reversed; and the decision was referred to in *Crofton v. Ormsby* (n) by Lord Redesdale as

(i) *Supra*. 1 East 619.

(k) See *Lloyd v. Collett*, 4 Bro. Ch. Ca. 469. and Mr. Eden's note (c) p. 472. *Sugd. Vend. and Purch.* 308. *et seq.*

(l) *Milward v. Earl of Thanet*, 5 Ves.

720. n.

(m) 1 Bro. P. C. 200. Toml.

(n) 2 Scho. and Lefr. 583.

proceeding on the ground of laches: but, as many other important objections were taken to the decree, and the reversal being general, it is impossible to know how far this particular objection was regarded as a material ground of the decision.

In the case of leases renewable for lives in England it has frequently been determined that such right of renewal will be lost if the lessee neglect to renew upon a life dropping: but in the case of a lease for years renewable the request does not seem to be of the essence of the contract. (o) In one case, (p) indeed, the omission to make the request for renewal of a lease for years prevented the specific performance of the covenant: but that appeared to be from the nature of the thing demised, which was a colliery, where it was said to be of more importance that the lessor should know that his tenant would continue than in any other. The general rule is so far qualified, that there is no authority to decree a specific performance of such covenants, unless there are circumstances to excuse the default in making the request at a convenient time. (q)

The cases in Ireland on this subject rest upon a peculiar local equity: it has been computed that one-seventh of the whole landed property in Ireland is held on leases renewable for ever: they have been uniformly the subject of family settlements, mortgages, and other securities for money; and the owner of such an estate has always been liberally dealt with, as if he were the owner of the fee. It has accordingly been considered part of the policy of that kingdom to protect and preserve the rights of tenants to renew, although they should have neglected to renew at the proper time. The later cases, (r) indeed, in the House of Lords reversed the decisions in Ireland: but these determinations, however agreeable to the principles of equity in England, gave great dissatisfaction in Ireland, and ultimately produced an act of parliament there, the stat. 19 and 20 Geo. III. c. 30. commonly called The Tenantry Act, which revived the old equity; and pro-

(o) *Baynham v. Guy's Hospital*, 3 Ves. 295. *Eaton v. Lyon*, 3 Ves. 690. *Bailey v. The Corporation of Leominster*, 3 Bro. Ch. Ca. 529. *Willan v. Willan*, 16 Ves. 72. *The City of London v. Mitford*, 14 Ves. 41.

(p) *Allen v. Hilton*, 1 Fonbl. Eq.

432.

(q) *Rubery v. Jervoise*, 1 T. R. 229. *Bateman v. Burray*, Dom. Proc. 1779.

(r) *Vipond v. Rawley*, 1774. *Kam v. Hamilton*, 1776. *Bateman v. Murray*, 1779. 1 Ridg. P. C. 189. note, 5 Bro. P. C. 20. Toml.

vided, that in cases of mere neglect, where no fraud appears to have been intended, and there has been no dereliction on the part of the tenant by neglecting or refusing to renew after the landlord has demanded the fine, the courts of equity shall relieve on adequate compensation being made.

In *Crofton v. Ormsby*, (s) which has been before mentioned, where there had been an enjoyment under an agreement, it was objected that there had been laches in not requiring an actual lease. Upon this point Lord Redesdale made the following distinction: "Unquestionably to a certain extent there had been laches. If it is to be said that it is laches to rest upon an equitable agreement, this is laches. Now what is this laches? Is it like the laches in *Wingfield v. Whaley*, (t) and *Milward v. Earl Thanet*, (u) or the other cases? No, these were cases of a different description. The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is the species of laches which will prevail against the equitable title. If I should hold it so, it would tend to overset a great deal of property in this country where parties often continue to hold under an equitable contract for forty or fifty years, without clothing it with the legal title. I conceive, therefore, that possession having gone with the contract, there is no room for the objection. *Wingfield v. Whaley*, and the other cases, were cases of contracts for the purchase of an estate, where the vendor's whole object was defeated by the delay, it being to change the lands into money." So, in cases of a different description, Lord Redesdale said courts of equity ought to refuse a specific performance, where, after the delay, the enforcing the specific performance would be very injurious to the party sought to be charged; and his lordship cited two cases to that effect.

In *Nesbitt v. Mayer*, (x) an application was made by the lessor for the specific performance of an agreement for a term expired before the hearing of the cause. The defendant had taken possession under the agreement, and refused to execute a counterpart. The bill alleged the cutting down of ornamental timber; and it was contended that the plaintiff was entitled to a specific performance in order that, upon a lease to be executed with proper cove-

(s) 2 Sch. and Lefr. 586.

(u) 5 Vca. 720. n.

(t) *Supra*.

(x) 1 Swanst. 223.

nants, he might at law recover damages for the breach of them. The master of the rolls observed that, without determining whether a case might arise in which the Court, for the purpose of investing the party with a right to satisfaction for the breach of covenants which the lease was to contain, would not decree a specific performance after the expiration of the term, the present case did not contain sufficient for that purpose. The only effect of a decree would be to encourage litigation. By the evidence of the person who cut down the seventy or eighty poles in question, it appeared he had been previously employed by the plaintiff to repair the premises. They were represented in the treaty for the lease to be in complete repair; and this witness proved that, with the exception of a fence, that statement was correct. The fence wanted repair: but, instead of consulting the plaintiff on the subject, the defendant engaged this workman to cut down poles amounting in value to about 3*l.*; and the poles were employed in repairing the fence. This conduct was incorrect:—but what damages would a jury give? None, certainly, to compensate the expense of litigation. The bill was dismissed; but without costs; because, in strictness, the plaintiff's rights were infringed. (y)

In *Western v. Perrin*, (x) where there was an agreement for a lease for five, seven, or nine years from Michaelmas preceding, determinable on twelve months' previous notice at the end of the first or second term; and the defendant had given a regular notice to quit at the end of the five years; specific performance was refused, and the bill dismissed without costs, on the ground that the term was at an end by the notice. But in another case (a) a cause was advanced, in order that the hearing might take place before the expiration of the term.

It is clear that at law any forfeiture in the case of an actual lease would be waived by a subsequent receipt of rent with notice, or by any other acknowledgment of the tenancy: but it is a different question in equity with respect to decreeing specific performance after such conduct on the part of the tenant as would have

(y) Sir W. D. Evans observes on this case that there can be no doubt but that the facts alleged would have been sufficient to support an action on the case, independently of any

written lease, as arising on the mere relation of landlord and tenant.

(z) 3 Ves. and B. 197.

(a) *Hoyle v. Liveasy*, 1 Meriv. 381.

amounted to a forfeiture at law. In *Boardman v. Mostyn* (b) Lord Eldon said, "If the plaintiff has plainly violated his contract, it will be very difficult to persuade me at the end of five years to grant him a lease, the covenants of which it is demonstrated he would have broken if it had been granted to him before. I do not think the waiver by receipt of rent prevents the defendant from desiring the court not to put him in the power of such a tenant hereafter."

In the case of *Jones v. Jones*, (c) Sir W. Grant, with reference to this point, said, "It is admitted, that this court will never decree the specific performance of an agreement, if it is clear that covenants must of necessity be introduced into the instrument to be executed, that the party resisting the performance may immediately take advantage of to deprive the other of all benefit from that instrument. But it ought to appear clearly that such is the case; otherwise the proper and the safest course will be to direct the execution, and then allow the other to avail himself, if he can, of any breach of covenant: for that question, whether a covenant has been broken or not, if there is any doubt of the fact, is more proper for the determination of a court of law and a jury. We know that a covenant may according to the strict letter be broken, and yet no recovery be had in an action on the covenant. Many circumstances enter into the consideration, and may weigh with the jury. Many things amount to a waiver of the covenant or forfeiture expressed or implied. Wherever, therefore, there is the least doubt, whether the covenant has been broken or not, the court ought not to preclude the inquiry by denying the relief that is prayed."

Where there was an agreement for a lease in writing, in which there should be inserted a proviso for re-entry on a breach of any of the covenants, it was held, if the tenant occupied under the agreement, and acted in such a manner as would have given a title of entry if an actual lease had been made: the Court of Chancery will not after such a breach enforce a specific performance on the application of the tenant, unless there has been a waiver of the forfeiture on the part of the lessor. It will follow that if it decrees such a performance, it will not allow the lessor to take advan-

(b) 6 Ves. 472.

(c) 12 Ves. 186.

tage of the circumstance of the lease bearing date before it was made, without giving the tenant the benefit of the waiver of the forfeiture. (d)

It should, however, be remarked, that if a tenant has paid rent under an agreement specifying particular covenants to be inserted in the lease, with a right of re-entry for the breach of them, an action of ejectment may be maintained on the breach of any of them, although no lease shall have been executed; (e) such a tenant being considered as holding from year to year on the terms of the agreement. (f) So where, in another case, (g) a tenant was let into possession under an agreement and paid rent, it was held sufficient to satisfy a count against him as a tenant upon a demise for mismanagement of the farm contrary to the agreement.

In the abovementioned case of *Gourlay v. The Duke of Somerset*, in the course of argument it was said, If the agreement had been executed, the defendant would have a right to enter for the forfeiture incurred by not merely permissive, but wilful, waste. The court would not have relieved against that forfeiture;—and why is the tenant in a better situation, having a contract merely executory? As to this, Lord Eldon said, “I will not undertake to say, whether there may not have been such cases as have been alluded to; much less, that there never will be such a case. Where, even if no right of entry were to be introduced under an agreement for a lease of a farm, yet a court seeing a gross case of waste, which will in all cases be a forfeiture of the place wasted, remediable or not, and gross breaches of covenant that could not well be indemnified by damages, would leave the tenant to law, and grant no relief here.”

Upon this part of the subject, Sir W. D. Evans observes, that he takes it to be very far from clear that a court of law would sustain a forfeiture of a lease in respect of acts done prior to its execution. It is clear that the date of a deed induces no estoppel with respect to the time of the execution; and as courts of law lean very much against forfeitures, it seems very probable that the proof of the date of execution would be admitted as a sufficient

(d) *Gourlay v. The Duke of Somerset*, 19 Ves. 429. 1 Ves. & B. 68.

(f) *Doe d. Bromfield v. Smith*, 6 East. 530.

(e) *Doe d. Oldershaw v. Breach*, 6 Esp. 106.

(g) *Tempest v. Rawlins*, 13 East. 18.

answer to any charge of forfeiture grounded upon acts prior to such execution, although subsequent to the date.

The general proposition that the party himself, with whom the contract has been made, has a right to enforce the performance, is sufficiently obvious. The exception to this rule, with respect to the intended tenant himself, may afford considerable assistance in coming to a true conclusion with respect to claims of others succeeding to his rights. It is to be recollected that this contract differs from a contract of sale in respect of the personal confidence which the landlord reposes in his tenant as to the management of the estate; and the continued existence of the relation induces several important obligations. In the case of *Willingham v. Joyce*, (*h*) before Sir P. Arden, M. R., the reasons for refusing a decree of specific performance, on the ground of personal objection to the conduct and character of the intended tenant, were much considered. In that case it appeared, from the evidence, that upon the application of the plaintiff, the defendants said, they would not let their house to any one who would let lodgings. He said he did not wish that, as he was an attorney, and wanted it for himself; that he had lived nine years in the house under A., the former owner, and only quitted it because she wished to live in it herself; that he paid his rent quarterly, and that they would be satisfied with the character A. would give him; but they must call that evening, as he was to give an answer that evening about another house, and was going out of town next morning. Notwithstanding this representation it appeared that he had been tenant to A. a very little time, and had been distrained upon for rent and taxes: nor would he quit her house till she consented to refund 5*l*. he had paid her, and accept his notes for the rent due, which notes were never paid. Upon going away, he also had committed wanton damage, and behaved very ill. A. gave the plaintiff a character to the defendants in order to get rid of him: but afterwards told them the truth. These particulars were proved by her. It was also proved that the plaintiff let lodgings; and the defendants, upon receiving the information, offered to give up the rent if he would quit the house; that he was a bankrupt in 1789, and obtained his certificate in the same year; and a letter was proved to have been written by him, dated June 1796, (the

year the cause was heard) in which he acknowledged that it was necessary he should be from home till his affairs were settled. There was also a summons to convene his creditors. Mr. Lloyd for the defendant:—the defendants may use the evidence to shew that the plaintiff is not a proper person to have a performance, as in a case of misrepresentation. The plaintiff has filed a bill for performance of an agreement, which from his situation he cannot execute. There may be cases in which the court would not execute it, as if he had committed a felony; and the consequence is the same to these defendants. Master of the Rolls,—Certainly in the case you put I would not execute the agreement; nor would I execute a specific performance merely to give up the house to assignees. They could not file a bill of this kind for the house or habitation, unless they chose to take it and be tenants, and enter into covenants. The parties came to a compromise: but the Master of the Rolls desired it to be observed, that if it had not been for their coming to these terms, he would have dismissed the bill with costs.

In a subsequent case, (*i*) to a bill for a specific performance, and injunction against an ejectment, several facts were stated in the answer, to shew the misconduct of the plaintiff in the management of the estate, and the insolvency of his circumstances. The case came on upon a motion for an injunction, which was granted upon terms, in order to bring the facts more fully before the court. Upon the general doctrine, applicable to this part of the subject, Lord Eldon said, “The articles having provided that the estate should be possessed in a husbandlike manner, under covenants to give it a proper value during the whole lease, if after five years, from 1796 to 1801, (when the bill was brought) the tenant has so misused the land, that it may be difficult to recover the value it would have had if properly possessed during the remainder of the term; it would be extraordinary to say, it is fit to give the tenant the execution of the contract, merely to give him the chance of trying to restore it; and if he has plainly violated his contract, it will be very difficult to persuade me at the end of five years to grant him a lease, the covenants of which it is demonstrable he would have broken, if it had been granted before. I do not think the waiver by receipt of rent prevents the defendant from

(*i*) Boardman v. Mostyn, 6 Ves. 467.

desiring the court not to put him in the power of such a tenant hereafter."

In *Buckland v. Hall*,^(k) (heard in 1803,) the plaintiff being in possession under a subsisting lease, contracted for a new lease; and, continuing in possession, upon an ejectment brought against him by the defendant, filed a bill for specific performance and injunction. The defendant by his answer, in addition to a charge of breach of the agreement by not performing the stipulated repairs, shewed that the plaintiff became insolvent in 1801, and paid a composition. He had paid the old rent up to Michaelmas 1802. Upon a motion for an injunction, Lord Eldon said, "In a case of this kind, the court must take care a tenant is not rashly turned out of possession. On the other hand, it is too hard against the landlord to introduce upon the record an averment, that the tenant has some way or other become solvent. With respect to insolvency, the weight of that objection is more or less in different cases. There is a distinction, certainly, between a purchase and a lease. In the former instance, the bill for specific performance, tenders payment of the purchase money: the latter is very much otherwise; and the court ought not to forget the habit of dealing among mankind, with regard to the relation of landlord and tenant." And in a further part of the same case, his lordship said, "Therefore insolvency admitted and not cleared away is a weighty objection to a specific performance of an agreement for a lease, the party here seeking an execution beyond the law. Insolvency would be a weight with a jury: such a question appears never to have been determined, and is of too much consequence to be decided upon motion. I shall, therefore, only say that at the hearing in general cases, it would have considerable weight with me; in some cases more than others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly; if beyond that, he undertakes for a considerable expenditure upon the premises, before he is to be placed in the relationship of lessee, that is directly connected as a most important circumstance with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent; for, unless done before the bill is filed, they are to be done after the decree; not immediately upon

(k) 3 Vea. 92.

tender, as in the case of a purchase, unless the bill can offer the amount of the utmost possible repairs to be paid into court. Under all the circumstances of the case, therefore, without relying upon any one, the injunction ought not to be sustained; certainly not without imposing considerable terms, such as bringing no writ of error, giving security for the costs of the cause, perhaps, for the rent and repairs. If any proposition of that nature can be suggested, I will hear it." The injunction was dissolved.

In a case (*l*) before Lord Redesdale, involving some particular circumstances, noticed in the decision, but to which it is not to the present purpose to advert, one R. being ostensibly entitled to the premises under a subsisting lease, but which in fact was held by him in trust for O'herlihy the plaintiff, a person in indigent circumstances, and in gaol for debt, entered into a contract with the landlord for a lease for three lives and sixty-one years in reversion. A bill was some years afterwards filed by O'herlihy, for declaring R. a trustee, as to the profits received, and against the defendant for performance of the contract. The prayer as to the former object had been acceded to by Lord Clare, and as to the latter the bill was dismissed; which dismissal was, upon a rehearing, affirmed. Lord Redesdale, after noticing the facts of the case, expressed himself as follows:—"Under these circumstances the plaintiff comes into a court of equity. Now what is the nature of the dealing between R. and the defendant? It is manifestly a dealing on the part of the defendant with R., a man of substance, capable of performing the terms of the agreement. Such must have been the representation made to the defendant at the time; and it could not be imagined for a moment that the plaintiff would answer such a description. It is clear the defendant cannot be compelled to perform this agreement, unless he has covenants from R., as a man of substance, for the performance of these terms. Now though, if the lease had been executed, R. would have been bound, and then the plaintiff would have had a right to an assignment, on indemnifying R. from the covenants, yet where is his right to compel R. to enter into these covenants? (and I am to consider what was the value of the lands in 1798, when the contract was made, and not what it is now in 1803; and whether it was so valuable that another person would have been disposed

(*l*) O'herlihy v. Hedges, 1 Sch. and Lef. 123.

to indemnify against these covenants.) But I cannot compel R. to enter into these covenants. If he had entered into them, and had done an act which was fraudulent on his *cestui que trust*, he must have abided by the consequences: but not having done so, can I decree him to enter into these covenants? yet I must do so, to make the decree that is sought. "Suppose," continued his lordship, "that R. had brought an action at law against the defendant, what damages would a jury have given? None at all, or merely nominal, because he was not fairly dealt with. But suppose, instead of an action, R. had filed a bill against the defendant; R. could not have a specific performance, because he had misconducted himself, so that the bill would have been dismissed. Then what is this case? The plaintiff can stand only in the situation of R. on the principle that R. being a trustee can gain no benefit to himself." "There is a great deal," said his lordship, in a subsequent part, "to be considered, with respect to contracts of this kind. Here is a contract for the occupation of land, in which contract the solvency and character of the tenant are intimately concerned. They are not so important, however, as if the lease were at rack-rent; there the solvency and character of the tenant are every thing." The bill was accordingly dismissed.

The first case which occurs on the subject of enforcing the specific execution of contracts, in favour of those claiming to stand in the place of the person who made the contract, is *Hyde v. Skinner*.^(m) This case arose upon a covenant contained in a lease for five years, to renew the lease at the same rent and on the same covenants, upon the request of the lessee within the term. The lessee died within the term, having laid out a considerable sum of money in improving the premises; and his executors, within the term, requested the defendant, (the lessor) to make a new lease to them for fifty years at the old rent. It was objected that the request ought to have been made by the lessee, and not by his executors who might be insolvent persons; and consequently the lessor might be in danger of losing his rent. Lord Macclesfield, C. "The executors of every person are implied in himself, and are bound without naming: and the meaning of this covenant was to the end the lessee might be reimbursed the money which had been laid out in the improvement of the pre-

(m) 2 P. Wms. 196.

mises; for which reason it is immaterial whether the testator or his executors required the renewal of the lease: it need not be personal. But then the request for the making a new lease for fifty years is too much, for it might as well have been 100 or 200 years: but the usual term for letting being twenty-one years, let the defendant demise the premises to the plaintiff for twenty-one years, or for any less term as the plaintiff may elect. And though the lease is to be made upon the same covenants, yet that shall not take in a covenant for renewing the new lease, forasmuch as then the new lease would never be at an end. (n) As to the objection that the executors might be insolvent tenants, and such as the defendants would not care to trust; to this it may be answered, that there is to be a clause of re-entry in the lease; and the value of the premises being doubled by the improvements of the original lessee, such clause of re-entry will secure the landlord against any insolvency of the tenant. Therefore, let the defendant pay costs in this court, and also at law, for the ejectment which he brought against the plaintiff, and in which he has recovered judgment." Upon this last direction of the court, Sir W. D. Evans observes, 'Surely this was a very hard measure, when the plaintiffs had demanded a lease for so much longer, a term than they were entitled to.' The same learned person adds, that at the present day it can hardly be said, that there is any precise term for which leases are usually made; and a contract for a lease of an indefinite term would, most probably, be deemed void for uncertainty. In the particular case, however, just cited, he should have conceived the covenant to renew the lease should have been construed as a covenant to renew for the original term.

The assignees of a bankrupt are not entitled to the benefit of an agreement entered into with a view to the personal accommodation of the bankrupt, and merely by way of family arrangement; (o) and it seems to be doubtful whether they can have the benefit of a general covenant to renew for the interest of his estate. (p) The same may be said of the assignee of an insolvent, although the right to sue for a specific performance has been held to be in the assignee and not in the insolvent. (q)

(n) See *ante*.

(p) *Weatherall v. Geering*, 12 Ves.

(o) *Flood v. Finlay*, 2 Ball. and 513.
Beat. 9.

(q) *Bowser v. Hughes*, 1 Austr. 101.

In *Brooke v. Hewitt*, (r) before Lord Loughborough, the question whether the assignees of a bankrupt can claim specific performance of an agreement entered into with a bankrupt before his bankruptcy, was argued on demurrer. Lord Loughborough said there was a great deal of force in the reasoning in support of the demurrer: but it did not apply to the point of a demurrer. "The cases," observed his lordship to the counsel, "you reason upon are where executory contracts were entered into by persons who afterwards became bankrupts. Great difficulty might occur to the court upon the question whether they could go on to perform a contract under such circumstances: a person contracting with another for future performance." In a subsequent part his lordship said, that he could not say that the bankruptcy discharged the contract as a general proposition. The case of a purchase did not discharge the contract. I am to consider whether I can put any terms upon the assignees to make them do equity. The assignees might have made an agreement to sell the lease, making a profit upon it to a person to whom there could be no objection. I cannot say now that they may not have put the case under terms that might oblige me to perform it, supposing it is a complete agreement. Certainly the case will be attended with considerable difficulty to them at the hearing: but I cannot determine it upon demurrer. His lordship therefore overruled the demurrer. The solicitor-general (Sir J. Mitford, now Lord Redesdale,) said, Lord Thurlow under similar circumstances had executed such an agreement concerning a house in Ludgate-hill. His lordship (Lord Thurlow) said the bankruptcy was an assignment; and, if the party had made an actual assignment, the assignee would without doubt be entitled to a performance, because the lease would be to him and his assigns. The only objection is, that the covenant of the bankrupt would undoubtedly be of less value: but the assignee ought to enter into all the covenants. In the course of the argument in the preceding case, an old case of *Drake v. The Mayor of Exeter* (s) was mentioned, in which it was determined that if a lessor covenants with the lessee and his assigns to renew his lease, and the lessee becomes a bankrupt, the assignee cannot have any relief against the lessor. And the same case is recognised in *Moyes v. Little*. (t)

(r) 3 Ves. 253.

Eq. Ca. Abr. 53.

(s) 1 Ch. Ca. 71. 2 Freem. 183. 1

(t) 2 Vern. 194.

Upon this part of the subject the following important observations occur in the MS. placed in my possession by Sir W. D. Evans. The cases which have been mentioned certainly leave the law rather unsettled with respect to the question how far courts of equity will decree against specific performance of an agreement for a lease in favour of a different party from the person with whom the contract is actually made. It would seem to be clear that at law no action could be maintained for the not executing a lease to any other person than the individual with whom the engagement was immediately entered into, as the counter engagements of the particular lessee are the precise consideration of the agreement; and no other act, although equally beneficial, can be proposed as a substitute for that which is the object of a mutual agreement, to be perfected at the same time by a concurrent act of the respective parties. On the other hand, any alteration in the circumstances and situation of the intended lessee would not, Sir W. D. Evans conceives, be a defence in an action for damages for the refusal to grant a lease where such action was in other respects maintainable, although many of the facts which would induce a court of equity to refuse a decree for specific performance would most probably influence a jury in assessing the amount of the damages; especially where the personal qualities of the tenant must from the nature of the particular case be considered as a material object in the view of the landlord. In respect of the equitable claims of other parties, it is to be recollected that there is no mutuality between the lessor and those claiming to stand in the place of the lessee as assignees of bankrupts, executors, and others, with whom the point in question might happen to arise; as the lessor could in no case claim a right to call upon the latter to become parties to such a lease as was stipulated for by the persons to whose general rights they have succeeded: neither in the case of bankruptcy could the assignees compel the bankrupt to become party to a lease, subjecting himself to a new personal responsibility for their benefit.

Among the cases, continues Sir W. D. Evans, which have been mentioned, some turn upon a covenant for renewal contained in an actual lease, and others upon mere executory agreements. These appear to stand upon very different footings from each other: and the latter alone are properly connected with the immediate subject under consideration; the former being only

material so far as they may appear to involve principles common to both. A covenant for renewal has been established by several cases, which will be noticed in their proper place to run with land: and of course to be one of which assignees of the term, however constituted, have a right to claim the benefit at law; which right I apprehend would almost in every case be recognized and acted upon by a court of equity in a suit for specific performance. On the other hand, there does not appear to be any reason for carrying the construction of such covenants further in a court of equity than it would be admitted in a court of law; and if the covenant were expressed in such terms as to be referable solely to the person of the lessee, and upon which another party succeeding to his rights would not be competent to maintain an action for damages; it would seem to be contrary to the real intention of the contract to admit such other party to claim the benefit of a specific performance.

In the case of *Hyde v. Skinner*,^(u) the precise terms of the covenant are not set out: it is merely stated to be a covenant to renew upon the request of the lessee, and it may be inferred that the terms "executors and administrators" were not mentioned. It is difficult to conceive that in an action on such a covenant the request would not be held to be a personal act; more especially if the expression "executors and administrators" were inserted in the other parts of the lease at the place where they usually occur. In the other parts of the case it is difficult to discover whether the lord chancellor considered the two circumstances of the right of the executors to stand in the place of their testator, and of the money expended in improvements, as being each of them independently of the other a sufficient inducement for giving the relief prayed; or whether their concurrence was regarded as a necessary ingredient in the decision. In the first part of his judgment he adopts the general principles, that the executors of every person are included in himself; that it is immaterial whether the request is made by the party or his executors, and that it need not be personal. The doctrine that the executors of every man are contained in himself is only true in respect of mere perfect rights and obligations, and not where

(u) *Supra*.

some act is to be done in which the difference between one person and another may be of material concern to the individual, who is under an obligation to do a certain thing, of which that act is the concurrent or preliminary condition : and to say that in such a case a given act is or is not personal, whatever weight it may have as mere authority, does not assist the argument in point of reasoning. But where the objection is expressly stated that the executors might be insolvent tenants, it is not met by any observations supporting the accuracy of the general doctrine previously stated ; but by a reference to the incidental circumstance, that in the particular case the value had been so much increased by improvements, that the condition for vacating the lease was a sufficient security in point of value for the covenants being performed : an assumption which would certainly in many cases be very materially at variance with the fact. And when it is also considered, that a general covenant for renewal in a lease for five years, was held to give a right to a lease for 21 years, Sir W. D. Evans apprehends that the case itself is one, the adherence to which, if supported by a principle of deference to its authority, would be found at least to be very repugnant to general utility. In the several other cases which have been stated, the inclination of the court seems rather to have been in cases of mere executory agreements, to withhold the specific performance, except in favour of the party who was the immediate object of the contract ; and whatever exceptions may be admitted in respect of particular circumstances, under which the personal qualities of the lessee may be regarded as clearly immaterial, the general convenience of the public would perhaps be best consulted, by leaving the parties interested to the pursuit of such redress as may be competent to them by application to a court of law.

The party applying for relief ought to be free from all impropriety of conduct ; therefore specific performance of a lease in consideration of the surrender of an old lease was refused, because the tenant suppressed the circumstance that the *cestui que vie*, upon whose life the old lease depended, was *in extremis* when the agreement was signed. (y) So the concealment of any other material fact is a gross fraud, and will avoid the con-

(y) *Ellard v. Lord Llandaff*, 1 Ball. 1 Bro. P. C. 314. Toml. and Beatt. 241. *Pendred v. Griffith*,

tract. (x) But an agreement has been decreed to be specifically performed, though the plaintiff had subsequently entered into an agreement to underlet contrary to the articles: because an agreement would not be a cause of forfeiture, even if a lease had been made. (a)

In the case of *Bonnett v. Sadler*, (b) the plaintiffs were coach-makers in Lisle-street, and owners of a private house next to that in which they carried on their business. The defendants stated themselves to be shoemakers; afterwards that they were of no trade, but wanted the house as a private house. An agreement was executed for a lease for 21 years; the lessees to lay out 100*l.* in repairs, under the direction of the plaintiff; and not to carry on any offensive trade. As soon as the defendants had obtained possession, they immediately proceeded to make the necessary alterations in the house to carry on the coachmaking business. On a bill for an injunction, the lord chancellor said, that under the circumstances an injunction was proper. Although it could not be contended, that this particular business was within the clause, restraining the lessees from carrying on any offensive trade; yet it struck him upon the fraud to be a serious question, whether, if the plaintiffs brought an ejectment, it would be possible for a court of equity to say they ought not to proceed at law. This court would pause long before they executed an agreement under such circumstances; surprise and studious concealment for the very purpose of obtaining a lease which they knew they could not obtain, except under such concealment. The articles were drawn up with a cautious reference to this sort of subject: the lessees were not to have the lease till 100*l.* were laid out to the satisfaction of the lessors, or under the directions of their surveyors. Another consideration, that this was a total change of the nature of the premises, which were to be left in repair under the ordinary covenants, increased the reluctance of the court to execute the agreement.

In all cases of a claim for specific performance, length of time is a material circumstance in favour of the defendant. Where therefore B., being in possession under an agreement on his marriage, conveyed his interest to trustees in strict settlement; and the lessor afterwards recovered the lands in ejectment from B.,

(a) *Meade v. Webb*, 1 Bro. P. C. 309. Toml.

(a) *Williams v. Cheney*, 3 Ves. 59.

(b) 14 Ves. 536.

and then leased them to C., and afterwards sold the reversion, neither B., nor his trustees ever attempting to recover the possession; the eldest son having brought a bill on the death of B. twenty years after for a specific performance, it was dismissed, as the title after such a lapse of time could not be sustained against a *bond fide* purchaser of the legal interest, with twenty years' possession; (c) and it was said that the opinion of Sir J. Jekyll in *Lechmere v. Lord Carlyle*, (d) that the forbearance of trustees to do their duty should not prejudice their *cestui que trust*, had been often denied, and was contrary to many decisions. (e) So specific performance of an agreement for a lease was refused from the laches of the plaintiff, who after bill filed and answer put in controverting his right, being put out of possession, acquiesced 19 years in the adverse title and possession of the defendant without prosecuting his suit. (f)

In decreeing specific performance of an agreement the court will take the whole subject to itself, and determine by its own officer what are proper and usual covenants where none are specified. So where (g) a question was made whether the reference to settle the lease should be to the master or to a Mr. Gale under a provision in the agreement, that a lease and counterpart should be prepared and executed by the parties which should contain all such conditions, reservations and agreements with respect to alteration, and the manner in which the farm should be left, and all such usual and proper conditions, reservations and agreements as should be judged reasonable and proper by John Gale, &c. land-surveyor, and in case of his death by some other proper person to be mutually agreed upon by the said parties; the master of the rolls said, that in some cases under particular circumstances, as in *Waters v. Taylor* (h) relative to the Opera House, and the case of a brewery where there were many partners, the court had said it would leave the parties to the remedy (arbitration) they had chalked out for themselves: but then it re-

(c) *Pentland v. Stokes*, 2 Ball. and Beatt. 68.

(d) 3 P. Wms. 215.

(e) See *Wych v. The East India Company*, 3 P. Wms. 309. *The Earl v. The Countess of Huntingdon*, 3 P. Wms. 310. *Hovenden v. Lord An-*

nesley, 2 Scho. and Lefr. 609.

(f) *Moore v. Blake*, 1 Ball. and Beatt. 67.

(g) *Gourlay v. The Duke of Somerset*, 19 Ves. 429.

(h) 15 Ves. 10.

fused all interposition. It did not act through the agency of arbitrators; appointing them to take an account, and adopting their decision as a decree. When the agreement is that the price of an estate shall be fixed by arbitrators, and they do not fix it, there is no contract; as the price is of the essence of a contract of sale, and the court cannot make a contract where there is none. But where the court has determined that the agreement is binding and conclusive, and such as ought to be executed, it does not require foreign aid to carry the details into execution. Gale's agency is not of the essence of this contract. The plaintiff will not contend that there is an end of it, if Gale refuses to settle a lease. If the defendant insisted, that the only lease he was bound to execute was one to be approved by Gale, (his own steward) and not by the court, there would be more colour for the objection: but the plaintiff comes voluntarily into court; and, not stating that any lease was tendered, or any step taken for Gale's approbation, says he does not choose to be bound by the lease which the court may think a proper one. That objection does not lie in his mouth. Suppose the reference made to Gale:—is his decision liable to exception? If it is, the decision with regard to the propriety of the lease will ultimately be that of the court: if not, the court may be carrying into execution a lease which it may think extremely unreasonable and improper. If the parties had gone to Gale, and got him to settle the lease, and one of them had objected to the covenants as improper, and the bill had been filed by the other, the court would have inspected the lease; and if it were found unreasonable, would not have decreed the execution of the agreement. (*i*)

In addition to what has been here stated relating to specific performance prospectively, it should be observed that courts of equity exercise a jurisdiction of a remedial nature, where an agreement has been executed either by fraud, mistake or surprise, contrary to the intention of the parties; where, (*k*) for example, a lease had been granted with a covenant for renewal, and also the deputation of the keepership of a park. And a memorandum to renew concurrently with the lease, and upon renewal a few days before the expiration of the lease the renewed deputation had been made for the residue of the old term; it was held that this mistake ought to be rectified, and that

(*i*) *Emery v. Wafe*, 5 Vcs. 846. (*k*) *Islabert v. The Duke of Chandos*, 1 Eden, 372.

an under-tenant was entitled to the same relief as the original lessee. Where (*l*) however, on a treaty for the lease of premises, the lessor represented to the lessee that a public right of way which passed across the demesne had been stopped up by a presentment of the grand jury, and that a footway only existed by permission, and after a lease had been formally executed by the parties, it turned out that the right still existed; it was held that the lessee was notwithstanding not entitled to relief; because in this case there was no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting a right of way. The right of carriage way had been abated by the presentment; the lessor had been in possession thirty years; he had put up gates, and gave directions to his servants not to allow any to pass without permission. All which was strong evidence of interruption acquiesced in. Moreover, although the lessee had been indicted for a nuisance, for a wall built by him across the way, and the verdict had been given against him, yet this was not conclusive evidence of a right of way; for it was only evidence, and could not be pleaded in bar to a civil action; and, if the lessee had brought his action of trespass, it would not have bound him.

In *Willan v. Willan*, (*m*) a testator being tenant under a church lease, renewable every seven years on payment of a fine, at the will of the lessor, entered into an agreement for a perpetual renewal of an underlease at a fixed rent; and the devisees in trust executed a lease in pursuance of it. According to the marginal abstract, the Court of Chancery, upon the application of the *cestui que trust* for life and in remainder, decreed the lease to be cancelled, and the agreement to be delivered up, as having been obtained by surprise, neither party being aware of the effect of the instrument, because the fines to be paid to the church were likely continually to increase: and yet no fine was to be paid on the renewal of the underlease, neither was the rent to be increased. It was admitted, indeed, that the underlessee was an object of the testator's bounty: but, as the amount of the intended benefit was uncertain, the court thought it could not execute the agreement.

Upon this case, Sir W. D. Evans observes that the circumstances are so peculiar, that perhaps the case will not be considered as having much influence on any other not containing a

(*l*) *Legge v. Croker*, 1 Ball. and Beatt. 506. (*m*) 16 Ves. 72.

similar combination of facts. The agreement was made within a very few days previous to the death of the testator. It appeared also that the premises were worth 1200*l.* a year, and that the fine and interest for a term of seven years would amount to as much as the rent. Evidence was given of the incapacity of the testator ; and the agreement was charged to have been obtained by the undue influence of a person of the name of Baines, by whom it was prepared : but this charge was not sustained. The widow of the testator stated, that she sent for the defendant by the testator's desire, intimating the testator's wish to give him a preference, and desiring that Baines might come down immediately. He (the defendant) was sometimes at the testator's eight or ten months together ; was much esteemed by him, and a man of probity and character. The deponent was not present at any conversation between them and the testator. When the defendant came, having quitted the room leaving them together, she believed he had his reason and understanding then, as he had upon other parts of that day ; and did not recollect any particular occurrence to induce her to believe he had not then. About a quarter of an hour after the defendant and Baines left the testator he sent for her, and asked whether the defendant was gone ; and, being informed he was not, desired him to be sent for ; and said to him, in her hearing, " John, that agreement must not stand : it is giving the estate away." To which the defendant replied, " You, sir, have left the estates to my son, in failure of William Willan's (a son of the plaintiff) children ; so I shall be making the farm better." Adding, " If you do not approve of it, when you are better, the agreement shall be cancelled." The decree pronounced by the Lord Chancellor declared that, regard being had to the agreement it would be contrary to equity to compel the trustees or the persons beneficially entitled to carry the said agreement into execution. That the demise by the trustees was not binding on the *cestui que trust*, and ought to be delivered up, and also the agreement : but that the defendant was entitled in equity to the residue of the old term, which was in existence previously to the lease made by the devisees ; or, if cancelled, to a proper lease for the residue of that term. Directions were given accordingly, including an inquiry what substantial improvements had been made by the defendant or his undertenant in possession.

The cause was reheard upon the petition of the defendant. The

lord chancellor said, "This petition of rehearing is presented on three grounds: 1. That the bill ought to have been entirely dismissed: if not, 2dly, that the defendant should be declared to be entitled to one lease: or, 3dly, that the decree ought not to have directed the agreement to be delivered up, but should have left him in possession of it, giving him the opportunity to make what he could of it at law. With regard to the second ground, at the hearing I found it extremely painful to refuse that relief: and I have still the same feeling upon it; convinced, that if the party, proposed as the grantor, had lived, and an explanation taken place between them, some such lease would have been granted: but from the event of his death, without any further explanation, the only consideration is what the court is authorised to direct. It is clear upon the will the testator intended the benefit in these leasehold estates to be as lasting as that which could be taken in the freehold estates, the subject of devise in the former part of the will. It appears also that the defendant is a person for whom the testator had a considerable regard, and with whom he intended to deal, as a benefit and bounty to him, for some lease, independent of the transaction closed by the agreement, which is the subject of this suit, the amount of which benefit I am unable to state from any evidence. If the agreement was altogether voluntary, the mere result of bounty, this court cannot for that reason execute it: if partly voluntary and partly for consideration, I cannot execute such agreement without knowing precisely and distinctly how much is voluntary, and how much for consideration. The evidence contains many circumstances, perhaps, requiring the aid of a jury, before this agreement could possibly be executed; if not by its own contents liable to objection, and if the decision is to be upon the true result of all the circumstances which I look at quite independent of fraud and circumvention."

"Many of the directions," continued Lord Eldon, "that are given by this decree for the benefit of the defendant could not be part of it, if the agreement is to be left in his hands to make what he can of it at law. The decree, however, stands, not upon the ground of fraud or circumvention,—not upon imbecility of mind only, influenced by bodily weakness;—but upon the combined effect of that imbecility, and ignorance of the real effect of the transaction, leading, perhaps, in some degree, to account for the circumstance that the testator did not understand the agreement;

but not necessarily to be considered as accounting for that, nor in my view of the case material, as I am perfectly persuaded by the evidence itself that the defendant did not understand this agreement; and understanding it, would not permit it to have its whole effect. The court, not deciding upon loose speculation upon the instrument laid before it, must attend to the contents of it, originally and finally, as furnishing what is the effect of it. To the argument that a lease was granted upon the same terms to another person of the name of Hoare, (by the testator himself) it is sufficient to answer that I do not say this court would disturb a lease actually made in pursuance of this agreement, without any other circumstances, the party deciding for himself: but the question is whether a court of equity is to carry into execution such an agreement, or to leave the party to law, or to order it to be delivered up, when there is an interposition between the agreement and the execution of it. There are many cases in which the court will not disturb an agreement that has been executed, though it would have refused to carry that agreement into execution; and there are also many cases upon the other point, where, refusing to execute an agreement, it will leave the party to make the most of it at law, where a jury may determine upon all the circumstances what shall or shall not be given as damages: and there is a third class of cases in which the court, refusing to carry an agreement into execution, would not stand neuter, but would order it to be delivered up. The instance that has been mentioned, therefore, stands simply on the fact, that such a lease was made, perhaps, with a prior agreement; and may be distinguished first, as being an actual lease; secondly, as being in performance of an agreement, perhaps, not attended with such circumstances as attended and immediately followed this agreement."

After observing that covenants for perpetual renewal might be carried into execution against the owner of the inheritance, Lord Eldon observed, that the present case was different; for it was impossible that the parties could have understood it, and circumstances prove they did not understand it. "Consider the effect of it. Every seven years the lessor is to repurchase and to relet for ever at the same rent. The consequence is perfectly clear; that unless the rent is enormous, with reference to the present value, the lessor must purchase, for the purpose of making good his covenant, at the expense of a consideration that will leave him

nothing out of the rent. The bargain is, therefore, on the face of it a surprise upon both parties. Considering it unfortunate, that the evidence of Mrs. Willan was introduced as it was; yet, having heard it, I must give attention to it. The defendant's answer according to that evidence, that the improvement would be for the benefit of his sons, would be correct, if the payment of the fines did not eat out the value. The defendant adds, as an honest man, that if his uncle gets better, it shall be set right. That expression, it is contended, means only that the agreement should be cancelled, if the defendant got better: but if he did not get better, the defendant would insist upon it. But, according to my opinion, that is not a reasonable construction of that declaration; which is a declaration that would distinguish this from the transaction with Hoare, (before alluded to) even if that had rested in agreement, without an actual lease; and it is sufficient with reference to an instrument containing stipulations, which I think ought not to be carried into effect, to have the consent of both parties, that it shall not be executed."

"With regard to the question, whether if this agreement is not to be executed entirely, it ought to be executed to the extent of giving the defendant one lease for twenty-one years, wishing to give him that, I considered very anxiously whether I could do it under the sanction of any principle adopted and recognised in the proceedings of this court; and if this could be represented as an instrument containing so many separate agreements for distinct leases of twenty-one years, each lease renewable every seven years. If I could so construe it, I should think I was getting forward to the completion of a purchase, which the testator and the defendant would have completed, if death had not intervened: but I cannot from this paper ascertain any terms which the lessor meant to propose, or the lessee to accept, for a lease for twenty-one years; though I have little doubt that the uncle, if he had lived, would have given the defendant at least one lease for twenty-one years."

"The last consideration is, whether this agreement ought to be delivered up; and I think the decree right in that respect; not upon the ground that the defendant could not maintain an action which he would have a right to bring, though I am not aware what action he could institute effectually. If the decree should be altered in this respect, it would be necessary very materially to

alter it in another, as it contains directions beneficial to the defendant, to which, meaning to bring the action, he would not be entitled, as he cannot be entitled to recover damage for the breach of the agreement, and also to the benefit of those directions. In that view of it also it would be necessary to have an issue to try the effect of those circumstances, with reference to which I forbore to give any judgment: it is not sufficient to authorise a decree for delivering up this agreement, to shew that it was obtained by surprise, with regard to the effect of it; as in many cases upon that ground the court refusing to execute would leave the parties to make as much as they could of it at law. The question is, whether under all the circumstances here is such a case; and I think there is enough in the circumstances, particularly the evidence of Mrs. Willan, to authorise a decree that no use should be made of this instrument either at law or in equity, the effect going farther than they intended. The result of her evidence, and of the paper itself, upon the face of it is that this is a case of surprise, in which the court will not permit the agreement to continue in the hands of the person who has obtained it."

An appeal was afterwards preferred to the House of Lords, pending which the defendant presented a petition to the Court of Chancery for leave to file a bill of review for the purpose of examining witnesses in opposition to the evidence of Mrs. Willan, as to the conversation which passed after the execution of the agreement. It was determined, that such proceedings could not be allowed: but, with respect to the merits of the case, the Lord Chancellor said, "It is supposed that this decree stands upon the evidence of Mrs. Willan, and would not have been pronounced if the court had not been mainly influenced by her evidence. Admitting, if that is correct, that the decree could not stand, I deny that the decree has that foundation; disavowing any intention to rest it on her evidence, or to have made any other decree, if her testimony had not formed part of the evidence. The supposition that I should not have pronounced the decree, if that evidence had not been given, is merely the effect of misunderstanding; conceiving that without it, there is sufficient ground for relief. I have in the decree expressed the principle on which I made it; and would have stated that evidence as the particular ground, if I relied upon it. I think, therefore, the new evidence now proposed ought not to be received; and it would be too much to

grant a bill of review, when I conceive nothing ought to follow it." It may be observed that the decree states, "that regard being had to the agreement, it would be contrary to equity to compel the trustees or the persons beneficially entitled to carry it into execution:" but it does not mention the particular grounds for impeaching the agreement.

Upon the hearing of the appeal in the House of Lords, the decree was affirmed. (n) The Lord Chancellor said, that he had not proceeded in his judgment below, on the ground that the agreement was fraudulent, though he thought it would have been a fraudulent use of it to carry it into effect. He adverted to the evidence respecting the incapacity of the testator: but said that he had not thought it necessary to go into that point. But this had appeared to him to be an agreement obtained by surprise; and in this sense that it was a surprise to both parties; and that the appellant had agreed to give it up, if it had the effect of going beyond what was intended. He laid some stress upon the evidence of Mrs. Willan; and adverted to the objection that it ought not to have been received, (a question which relates rather to the pleadings in the cause than to any point of right connected with the merits.) If he could do all he wished, he should be glad to grant a lease. But the reason why he thought it could not be done was this, there was no analogy between this and the cases where there were several distinct agreements; for those had been determined on grounds that there were contracts made by the parties, which might be executed: but if the whole were but one contract, which could not be executed, equity would not introduce another contract for the parties. If the appellant had a right to one lease, the respondent would be able to compel him to take one. If the uncle had recovered, he believed they would soon have agreed: but he having died, and there being no terms in the instrument upon which one lease could be supported, he could not act upon a contract which had not been made, and so had no authority, unless he could support the agreement *in toto*. When he spoke of surprise, he merely meant, that was a case where, from imbecillity and the absence of proper advice, the testator did not understand the effect of what he did, and that it was unconscionable in equity that an agreement should be executed, which was a surprise on both parties.

(n) 2 Dow. P. C. 274.

Upon this part of the Lord Chancellor's judgment, Sir W. D. Evans observes, "I feel an unaffected difficulty in comprehending the extent of the doctrine intended to be here expressed, especially supposing the state of infirmity, in which the testator was, not to constitute an essential ingredient of the decision, and that it was intended to lay down a general position that upon an agreement obtained by surprise a party shall not only be refused the aid of a court of equity, but restrained from availing himself of such benefit as he might derive from the contract in a court of law; it being also assumed that there was no fraud or misconduct imputed to him in respect of the fact of obtaining the agreement. The terms of the agreement were in themselves sufficiently intelligible; that this farm should be held for ever upon a certain annual rent, without any increase in respect of fines, upon obtaining renewed leases; except as occasioned by additional buildings. In the conversation which immediately followed the testator shewed a consciousness that such a transaction was a disadvantageous one, as a matter of mere stipulation, and rested satisfied with the summary engagement of cancelling the agreement if he got better: but the only surprise, which, upon the whole of the case, I can collect to have been imputed, is that the party did not fully consider the disadvantageous consequences that would result from a contract, of the terms and import of which he was sufficiently apprized. I conceive, however, it would hardly be allowed to state it as a general proposition, 'that a party entering into a contract, with full knowledge of the terms, should be released from the performance of it; because those terms were attended with more disadvantageous consequences than he had in fact contemplated;' yet what less general proposition can be stated as supporting this decree I am at loss to discover." In a subsequent case, (o) he adds, where an agreement was enforced as resulting from a correspondence between the parties, the Lord Chancellor said, "The defendant, I am satisfied, was not aware of the precise effect of the correspondence: but I am afraid, be that as it may, if the letters amount to a contract, so considered, the plaintiff has a right to have the contract specifically executed." And further on, "This then was an agreement on the one side, and

(o) *Kennedy v. Lee*, 3 Meriv. 441.

if accepted on the other was binding upon both, although it should turn out to be a surprise on the one or the other." Upon the rehearing, his lordship, after stating that the party seeking to establish a contract, on the result of a correspondence, was bound to point out to the Court a clear description of the subject matter, relative to which the contract was in fact made and entered into, added, "I do not mean, (because the cases which have been decided would not bear me out in going so far) that I am to see that both parties mean the same precise thing: but only that both actually give their assent to that proposition, which, be it what it may, *de facto* arises out of the terms of the correspondence." *Quære*, adds Sir W. D. Evans, whether here the objection is not narrowed too much; and whether, when it is assumed, that the terms expressed in a contract, (not merely the consequences resulting from it) differ from those which were contemplated by the parties, such a contract ought to be regarded as legally obligatory.

To return to Lord Eldon's judgment. It had then been insisted, continued his lordship, that if one lease could not be granted, at least the agreement ought not to be delivered up: and that this was one of the cases where, though equity would not execute the agreement, it would leave the party to his remedy at law. He did not say there was dishonesty: but if an agreement was obtained by surprise, under such circumstances as occurred in this case, it was against equity to permit any use to be made of it.

Lord Redesdale also entered into a full view of the reasons for concurring in the decision; and I apprehend, says Sir W. D. Evans, that his judgment must have been founded upon the peculiar combination of circumstances occurring in the case, and that many of the points taken separately are such as could not fairly stand the test of examination. Lord Redesdale observed, "It was a bill to set aside an agreement entered into at a time when one of the parties was on his deathbed, and clearly in a state of imbecillity; and also to set aside an actual lease founded upon it, upon the ground that the uncle, when he signed it, neither knew nor understood the contents of it; (p) and that advantage was

(p) Note by Sir W. D. Evans; surely the facts can hardly warrant this statement.

taken of his situation to get his signature. The effect of the agreement was clearly to put an end, in no very long time, to the value of the property of the lessor. The only stipulation in favour of the lessee was, that if there should be an increase of fines, on account of new buildings, they should be paid for by the lessee : all the rest arising from improvements in agriculture, &c. was to fall on the estate of the lessor. It was scarcely possible to suppose that any man in the full possession of his faculties could enter into such an agreement for valuable consideration. Then it was said, that this was partly for natural love and affection. But where an agreement purported in the body of it to be for valuable consideration, it could never, though obtained by a relation, be supported on the ground of natural love and affection ; for if it could, every agreement made with a relation must be supported, however inadequate the consideration." This reasoning, observes Sir W. D. Evans, is very unsatisfactory. The argument to which it is opposed by no means necessarily implies that a contract impeachable, as made without collateral reasons, upon the ground of inadequate consideration, must be supported in consequence of the parties being related. It merely opens the question of intention as a question of fact, whether such bounty and favour was or was not intended, which must be estimated by a general view of all the circumstances of the case. Mere inadequacy in the terms of an engagement is in no case a specific legal or equitable objection. It is a mere circumstance of evidence, from which a court may infer imposition or mistake. But if a contract, valid on the face of it, is to be impeached upon collateral grounds, justice evidently requires that all the circumstances should be fairly taken into consideration ; and if circumstances of consanguinity or friendship may naturally induce a party to make a contract more favourable to the opposite side than would take place upon the mere principles of traffic and barter, the question whether such relations did exist in point of fact should always be opposed to the inference of imposition, resulting from the mere fact of inadequacy of terms, especially in the case of an informal and preparatory instrument.

"The uncle," continued Lord Redesdale, "was at the time not incapable of making an ordinary lease, or a codicil to his will which he did on the same day : but was incapable of applying himself to a contract of this kind, which required deliberation

and calculation ; for this was clearly a contract for valuable consideration. Dr. Kirkland, (a physician) attended as a witness. He deposed that the uncle was not then in a condition to attend to business ; and he was informed that this was a mere lease between landlord and tenant, the terms of which had been settled before. No calculations appeared to have been entered into by the parties ; or, if entered into, they were perfectly false ; for the agreement was such that the lease would soon produce nothing to the lessor, who must therefore abandon it, as he was entitled to do, for there was no contract binding him at all events to renew. Suppose there had been no evidence of debility at the time, it might be questioned whether such an instrument, obtained under such circumstances, without any precise consultation as to the terms of the contract, might not be considered as the effect of surprise." After adverting to the other lease, made the same day, (to Hoare) as not affecting the merits of the question, Lord Redesdale proceeded to state that the respondent had made out the charge, that the uncle did not understand the effect of the agreement, and that advantage was taken of his situation to induce him to sign it. There appeared to him, (Lord Redesdale) no contrariety in the evidence, as to the state in which the uncle was at the time of the signature. He was capable of making a codicil to his will : but not of doing any thing which required deliberation. This besides was a bargain, and different in its nature from that expression of volition required in making a will. If the whole of Mrs. Willan's evidence was to be received and believed, the uncle himself afterwards considered it an improvident act : if the conversation stated by her actually took place, it shewed that the effect of the agreement had before been understood by neither the one nor the other. After adverting to the objection as to the admissibility of the evidence, he said that his conception of the case was this, that when a contract was manifestly unreasonable, if one of the parties taken by surprise, whilst in a state of debility, was made to depart from an original intention, and to act contrary to a previous design, then the contract ought to be set aside, as this was an advantage taken of his infirm state. After expressing his opinion in concurrence with that of Lord Eldon, that the court would not direct a single lease of twenty-one years, Lord Redesdale said, he thought it perfectly clear that when an agreement was obtained under such circumstances, by surprise for example,

that it was not fit to be acted upon in equity, it was unfit to be acted upon at law; and in such cases the practice was to order it to be delivered up; or, if an action was brought upon it, to order a perpetual injunction to restrain such action. He could not see, why if it were improper to act in this agreement in equity, it should be acted on at law.

Upon this latter part of Lord Redesdale's judgment, Sir W. D. Evans has the following remarks. This opinion would seem, if literally construed, to import a general principle, that whatever circumstances would induce a court of equity to withhold a decree for specific performance would also induce it to direct a delivering up of the agreement, and grant an injunction. It is however impossible, that such could have been the real meaning of the noble and learned lord, as no language is more familiar to courts of equity than that they would not interpose an extraordinary relief, by decreeing a specific performance; but would leave the parties to make what they could of the case at law: and many cases founded on this distinction occur in the judgments of Lord Redesdale himself. The proposition twice referred to in the course of Lord Redesdale's judgment, that a party was capable of making a codicil to his will, but not capable of doing any thing which required deliberation, also appeared to him very unsatisfactory, and almost unintelligible. A codicil as well as a will is an act which, according to the nature of its contents, may contain every variety from a simple pecuniary legacy to the most minute and complicate disposition. But it is very difficult to assent to the doctrine, that a power of testamentary disposition imports a less degree of intellect than a power of entering into a contract. A very different view was taken of the subject by the greatest jurist of modern ages, in one of his most distinguished productions. (q) He says, "Incapacity ought never to be examined with more attention than when the question relates not to a mere contract, but to that act which demands at once the greatest capacity and the most perfect will—a testament. The law which substitutes a testator in its stead, and invests him with the power and character of a real legislator; which gives him a right to change and disturb the natural and favourable order of legitimate successions; requires at the same time from

(q) D'Aguesseau. Second Pleading in the cause of the Prince de Conty.

him a capacity proportioned to the importance of his ministry, and a plenitude, or, if the expression may be used, a superabundance of will." The truth, in fact, lies between these two opinions; many contracts being of less complication, than many wills, and *vice versd.* Each case, therefore, must depend on its own circumstances.

Where (r) a warrant was granted for nominating two lives to an estate held under the crown, as part of the duchy of Cornwall, but subject to these conditions, *viz.* that the estate should be perfected in six months after the date of the warrant; that the warrant should be enrolled before the auditors of the duchy; that the fine should be first paid into the hands of the receiver-general for the duchy, or his deputy; and a certificate obtained under the hand and seal of one of them: these conditions not having been complied with according to the strict letter of the warrant, it was decreed void, and ordered to be vacated.

A court of equity is not bound to decree a specific performance in every case, where it will not set aside a contract, nor to set aside every contract which it will not specifically perform. A contract, for example, may be good at law, although the conduct of the plaintiff may not entitle him to the assistance of a court of equity. (s)

Upon a suit for specific performance it seems almost of course to grant an injunction against proceeding in an ejectment; notwithstanding the right to such performance may be strongly denied by the defendant in equity. But the court will at the same time impose proper terms to prevent such injunction operating more to the prejudice of the defendant than the necessity of the case requires, as by making the plaintiff in equity give judgment in ejectment, without putting the defendant to expense; go to commission and set down the cause for hearing next term; or upon the terms of delivering possession when required by the court. (t)

In the case of *Dann v. Spurrier*, (u) which will be mentioned more particularly on a future occasion, the bill, after praying for an injunction, prayed that if the court should be of opinion that the defendant had a right to proceed in ejectment, that he might be decreed to pay the plaintiff the money laid out in substantial

(r) *Moore v. Crosse*, 2 Bro. P. C. 341. Toml. set, 1 Ves. and B. 68. *Boardman v. Mostyn*, 6 Ves. 467. *Buckland v. Hall*,

(s) *Mortlock v. Buller*, 10 Ves. 292. 8 Ves. 92.

(t) *Gourlay v. The Duke of Somerset* 7 Ves. 231.

improvements; the bill having charged that the defendant looked on while the money was laid out, &c. The defendant stated that he knew nothing of the repairs till August; and that on the 4th of September he directed a person of the name of Phipps, (who was not called by the plaintiff) to give notice to the plaintiff to prevent his incurring further expense. Lord Eldon said, that it was upon the plaintiff to prove, not merely to raise a probable conjecture, but to shew upon highly probable grounds a case of bad faith and bad conscience against the defendant. The plaintiff fails in proving that; and his lordship added, "I fully subscribe to the doctrine of the cases which have been cited, (*u*) that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive he would not have done, but upon the expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt that he acted upon that sort of encouragement."

Where (*x*) after a decree for specific performance of an agreement for a lease, and a lease had been executed in pursuance of such decree, the plaintiff in equity brought an action at law to recover from the defendant damages for the delay in performing the agreement; the court said that, although in a new suit the defendant would be clearly entitled to an injunction, yet here the decree having been executed, they could make no such order in the original cause.

We have already observed that there is no distinction in point of form between executory agreements and others, such as leases, which may be denominated in this respect agreements executed. Therefore an instrument may in form be executory; and yet, if the intention appears to be that it shall operate as a present demise, the law will give it that effect. Licences, for example, to enjoy till a time certain have been held to be to all intents and

(*u*) *The East India Company v.* 688.

Vincent, 2 Atk. 83. *Stiles v. Cowper*,
3 Atk. 693. *Jackson v. Cator*, 5 Ves.

(*x*) *Ford v. Compton*, 1 Cox. 296.

purposes leases, and to admit of the same remedy for breaches of contract by either party. (y)

A covenant to permit and suffer a person to enjoy has been held to be no lease on the ground that the words "permit and suffer" shewed the intention to be, that the possession should remain in the person from whom the permission was to come : (x) but the mere circumstance of words of covenant being used is no objection to their operating as a conveyance of the present interest. The words "covenant, grant and agree," or any other words to the same effect, are sufficient to shew a present contract for the enjoyment, and therefore they have been held to make it binding and valid as a lease. (a) So in an action of covenant, (b) where A. by articles indented covenanted, promised, and agreed, that B. should enjoy certain lands for a term of years, though A. further covenanted that he would make to B. as good and perfect a demise of the premises, or security for the quiet enjoyment of them, as his counsel should advise; the court held that these articles in themselves were sufficient to constitute a present demise, and that the covenant for a future lease was only in further assurance. It appears, however, from another report of the same case, (c) that A. had nothing in the land at the time of making the articles, and they were therefore held to operate as a covenant only.

So in another case, (d) where articles indented were made between A. and B. in the following manner: *inprimis*, it is covenanted and agreed between the parties that A. doth let the lands in question for and during five years, to begin at Michaelmas next following under 10*l.* a year rent; or provided the lessee shall pay 10*l.* at Michaelmas and Lady-day by even portions during the term. Also the said parties do covenant that a lease shall be made and sealed according to the effect of these articles before the feast of All Saints next ensuing. This was held to amount to

(y) Year book, 5 Hen. VII. 1. Bro.

(z) 1 Roll. Abr. 848.

Abr. Licence, pl. 19. Hall v. Sebright, 1 Sid. 428. Clerk v. Palady, Cro. Eliz.

(a) Bro. Tit. Lease, 60. Whitlock v. Norton, Cro. Jac. 92. Drake v. Munday, W. Jon. 231.

859. Davies v. Mannington, 2 Sid.

(b) Tisdale v. Essex, Hob. 34.

109. Chapman v. Southwick, 1 Lev.

(c) 1 Roll. Rep. 397.

204. Jepson v. Jackson, 2 Lev. 194.

Stroud v. Hopkins, 3 Keb. 357. Tre-

(d) Harrington v. Wise, Cro. Eliz.

v. Roberts, Hard. 366. Right d.

486. See Maldon's case, Cro. Eliz. 33.

Green v. Proctor, 4 Burr. 2208.

an immediate lease by reason of the first words in the present tense; and the last words were held to intend such a future lease for further assurance; and the rather in this case because the lease to be sealed was to be made after the beginning of the term.

So in another case (e) a copyholder having covenanted that a lessee should have and enjoy the land for a year, excepting the last day in the year, *et sic de anno in annum*, during his life, excepting the last day in every year; it was held to be a cause of forfeiture, because these articles amounted to a lease at the common law.

Where, however, words of present demise are used, and there is also a covenant in the same instrument, so as to show that the parties knew perfectly the distinction, and meant each part of the deed to have its proper legal operation, no such construction is put on words of covenant.

In Lady Montague's case, (f) therefore, where a copyholder demised for one year, according to the custom; and further covenanted that the lessee should enjoy the land for one year, to commence after the expiration of the demise, *et sic de anno in annum*, for ten years: this was held to be a good demise for one year only; and the covenant worked no forfeiture, because it did not amount to a lease. So, in a more recent case, (g) a copyholder demised for one year according to the custom, and at the end thereof from year to year, if the lord would grant a licence, but so as not to create a forfeiture; and covenanted that the lessee should enjoy during the term aforesaid: after the expiration of the first year, the copyhold having been purchased by the lord, and surrendered to a trustee for him, it was held that an action of ejectment might be maintained against the tenant after the first year; and that no action would lie on the covenant for quiet enjoyment.

It may be here observed that, although leases of copyhold lands in the manner abovementioned will create a forfeiture if they amount to leases at common law; yet, if they rest in covenant, such covenants will be specifically performed in equity; and a request to renew on the part of the lessee will not be considered

(e) *Luttrell v. Weston*, 1 Bulstr. 215.
Richards v. Sely, 2 Mod. 79. *Lenthall v. Thomas*, 2 Keb. 267. *Mathews v. Weston*, Cro. Car. 233.

(f) Cro. Jac. 801. *Fenny d. Eastham v. Child*, 2 M. and S. 255.

(g) *Nunn v. Luffkin*, 1 N. R. 163.
 11 Ves. 170.

of the essence of the contract, if it appears that a certain interest similar to an estate for years at the common law is intended to be transferred.

In the same manner, where articles of agreement set forth with sufficient accuracy the terms upon which a lease is intended to be granted, the courts have not considered the mention of any future lease to be made in a technical form as a condition precedent to the perfection of the contract or the enjoyment of the land.

In the case of *Baxter d. Abrahall v. Brown*, (*h*) the lessor agreed with all convenient speed to grant a lease; and by the same agreement "let and set" to the lessee the lands comprised in the lease, to hold for twenty-one years, at a certain annual rent: and it was provided by the agreement that the lease in contemplation should be void for non-payment of rent, alienation, &c. and that it should contain the usual covenants, and certain special ones; in one of which the words "this demise" occurred. This agreement was clearly held to be a good present demise, with an agreement to execute a more perfect lease in future, the operative words being in the present tense; and the reference to the agreement by the words "this demise" had some weight with the court. But the case was decided under more favourable circumstances than others by which the rule might be supported; for the tenant had been fourteen years in uninterrupted possession under this instrument, and five or six of these years had been since the title of the lessor of the plaintiff had accrued. The lessor of the plaintiff had likewise accepted rent, and thereby had given the tenant every reasonable ground to suppose his acquiescence. It has, however, been observed by Sir W. D. Evans, that these circumstances furnish no legitimate ground for giving the instrument a different construction from that which it would otherwise have deserved.

The next case is that of *Doe d. Yea v. Bucknall*. (*i*) The grantor, by an unstamped agreement in writing, agreed to grant a lease to the defendant for twenty-one years: the defendant had enjoyed uninterrupted possession for eighteen years; but no lease had been granted by the lessor of the plaintiff, or demanded by the defendant. Lord Mansfield said, there might have been cir-

(*h*) 2 Bl. Rep. 973.

(*i*) Cowp. 473.

cumstances which would have supported the lessor of the plaintiff in this case ; as, for instance, if the lessor of the plaintiff had tendered a lease, and the defendant had refused to execute it, by which the lessor of the plaintiff had sustained some loss : but he said there were no such circumstances in the present instance ; and if the court should say that the action of ejectment ought to proceed, it would merely give the Court of Chancery an opportunity to undo all again, and the lessor of the plaintiff would have to pay the costs of both suits. This case has been cited (*l*) to shew that an executory instrument may be a good defence in ejectment : but it does not appear that the court wished to lay down any general rule of that nature. The case has certainly that tendency : but it has not been generally approved in the profession as a decision ; and it forms one instance, though not flagrant, of the desire which actuated Lord Mansfield to introduce what has been called a Prætorian system of jurisprudence into our courts of law, and which proceeded from an anxiety to administer substantial justice at the expense of a due regard to technical rules of law. (*m*)

At the very first sittings before Lord Kenyon the authority of this decision was urged in a case involving the principal question, whether a certain instrument amounted to an agreement or a lease ; and in which it was contended that, taking it only to be an agreement, the plaintiff who claimed title under the same person who made it could not recover the possession from the defendant : upon which Lord Kenyon said that it was the opinion of all the judges that the rule, at all events, could not extend to the case of a purchaser. (*n*) The allowing effect to equitable titles in actions of ejectment was about the same time put an end to by the case of *Doe v. Staple* ; (*o*) and the argument, that under such circumstances the defendant could at law resist the legal title of the plaintiff could not now be attempted by the most inexperienced practiser. The principle, adds Sir W. D. Evans, that the legal estate only can be regarded as a sufficient ground to support an ejectment, or to defend such action, the existence of the legal estate in the lessor of the plaintiff being established, seems to have been very erroneously departed from in the case of *Morris v. Rosser*, (*p*)

(*l*) *Sir James Lowther v. Lady An-
dover*, 1 Bro. Ch. Ca. 396.

(*m*) See also *Right d. Green v.
Proctor*, 4 Burr. 3203.

(*n*) *Doe d. Coore v. Clare*, 2 T. R.
739.

(*o*) 2 T. R. 684.

(*p*) 3 East 15.

in which an award, that certain premises should be delivered up, was held sufficient to bind the defendant in an ejectment. The court, with that precipitancy, of which the instances are much too frequent, refused even a rule to shew cause. In what light would such a decision have appeared, if introduced upon the record by bill of exceptions?

In the case of *Doe v. Bucknall* (q) no objection appears to have been taken at the trial on the ground of a want of a stamp: but it is clear that an agreement stamp would not have been sufficient, because the instrument was put in as a lease; and therefore the defendant could have no right to maintain his possession by virtue of it, without a lease stamp. (r) The contract, however, between the parties is an independent consideration, which is not affected in law or equity by the provisions which the legislature has thought proper to make with respect to the revenue. The most perfect contract would be equally unavailable, if it should be tendered in evidence without a proper stamp: neither would an agreement be a more effectual defence, because a lease stamp is affixed to it.

The next case in support of the same doctrine is *Barry v. Nugent*, (s) in error from the Court of King's Bench in Ireland. It was an action of ejectment. The terms of the agreement were to the effect following: Be it remembered, that A. hath let, and by these presents doth demise unto B. for twenty-one years, to commence on the fifth of May, or the first of November, which ever first happens after A. recovers the land therein mentioned; the said B. covenanting to pay to the said A., on the foregoing conditions, the sum of 110*l.* yearly and every year during the term. Leases with powers of distress and clauses for re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party, as soon as A. recovers the land from C. The court below were clearly of opinion that these articles of agreement operated as a present demise, and that the agreement for a more formal lease was only in further assurance. This decision, agreeing with the opinion of the court above, was affirmed.

In *Poole v. Bentley* (t) there was a memorandum in writing to

(q) *Supra* p. 266.

(s) Cited in *Doe d. Jackson v. Ash-*

(r) *Doe d. Walker v. Groves*, 15 East 244. *burner*, 5 T. R. 163.

(t) 12 East 168.

the following effect. A. agreed to let, and B. agreed to take certain premises for the term of sixty years at a certain rent; and B., in consideration of a lease to be granted, agreed to lay out the sum of 2000*l.* in building within four years. A. agreed to grant a lease as soon as a certain number of houses should be covered in. This agreement to be considered binding till one fully prepared could be produced. Lord Ellenborough, C. J. thought that the intention was that the tenant should have a present legal interest; though a more perfect lease was intended, when the houses should be built for the convenience of describing the premises for the purpose of assignments. Upon this case Sir W. D. Evans observes, that the ascribing this intention to the parties might be attended with consequences neither in the contemplation of themselves, nor of the court. For instance, suppose nothing to have been done towards the buildings, and no rent to be paid, and the lessee should refuse to execute a formal lease, he could never be evicted during the term; and the only remedy would have been upon the agreement.

The same doctrine was held in respect of the following agreement. (a) Watkins agrees to let, and also upon demand to execute to Groves a lease, &c.; and the said Groves doth agree to take, and upon demand to execute a lease of the said farm from the 5th April, 1798, at the rent, &c.; which lease is to contain the usual covenants, and an agreement for re-entry on case of non-payment of the rent or the non-performance of the covenants; that the agreement shall be binding until the said lease is made and executed. Lord Ellenborough, C. J. "If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I should have had considerable doubts: but, as the case stands, it does appear to me that the instrument must be considered a present demise from the 5th April, 1798." On which passage, Sir W. D. Evans observes, "Surely it seems more reasonable that the intention should appear positively that there was to be an entry and enjoyment previously to the execution of the lease, than that such intention should be inferred from the negative argument, that nothing appeared to the contrary. In the preceding case, which went abundantly far, there were facts implying an entry and occupation actually

(a) Doe d. Walker v. Groves, 15 East. 244.

stipulated to take place before the time when the lease was to be executed: whereas, in the present case, there was nothing to prevent an execution as soon as the lease could be prepared. This case certainly appears to go far beyond any that preceded it." In the same case, Lord Ellenborough further proceeded, "From that period, *viz.* 5th of April, 1798, it (the instrument) had the operation of a demise; not depending upon the contingency of the parties granting a future lease, which was a stipulation only for the better security of the lessee." This, observes Sir W. D. Evans, is taking for granted a great deal more than can be admitted to be correct. The stipulation, that the intended lease should contain the usual covenants, and an agreement for re-entry in case of nonpayment of rent or nonperformance of covenants, would, most probably, not be considered an actual condition; and the remedy of the lessor upon the usual covenants of an actual lease would have been much more extensive and beneficial than any which could have been had by action of *assumpsit* upon the agreement, independently of the consideration that the remedy upon the covenants would be transmissible with the reversion; and that a direct remedy will lie against the assignee of a lease for breach of covenant, but not for breach of a mere agreement. The case, however, was held by Lord Ellenborough to be within the authority of *Poole v. Bentley*: and "in *Barry v. Nugent*," his lordship added, "the court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of present demise. Here the lessee might never have the benefit of an executed lease: in the interim, therefore, this was an agreement to operate as a present demise, commencing immediately from the 5th of April, though a more formal demise was afterwards to be granted." It may, however, be observed, that the distinction in *Poole v. Bentley*, that the lease was not to be executed till after the completion of acts upon the premises, which might occupy some years, is very material. Also in *Barry v. Nugent*, the words, "hath let and by these presents doth demise," are clearly distinguishable from the expressions "agrees to let," and "agrees to take," which occur in the case last considered. (x)

(x) In *Roe v. Ashburner*, 5 T. R. 163, by Lord Kenyon, and MS. note by Sir W. D. Evans.

The first case in modern times, which appears to countenance a different principle, is that of *Goodtitle d. Estwick v. Way*. (a) There it was held that an agreement for a lease to be executed *in futuro* superseded the operation of words of present demise, although accompanied with immediate possession. The agreement when produced appeared to be on unstamped paper, and not under seal; and the purport of it was as follows: A. doth hereby agree to let, and B. agrees to rent and take for the term of seven, fourteen or twenty-one years, in case A. shall so long live, certain lands at the rent of 1400*l. per annum*. It is agreed that B. shall enter upon all the said premises immediately; but not to commence payment till Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties before Michaelmas next. This last express stipulation, that leases should be drawn before Michaelmas next, was considered as evidence of the intention of the parties that the agreement should not operate as a lease; but only give the lessee a right to the immediate possession. The only authority which supports this case is confessedly that of *Sturgeon v. Painter*. (b) In that case articles were agreed to between two persons, to the following effect: A. demised a certain close to B. to have it for forty years; a rent was reserved with a clause of distress; and afterwards there was written in the same paper a memorandum, that these articles were to be ordered by counsel of both sides according to due form of law. This memorandum was held to shew the intention of the parties that the articles should be preparatory only: but in this case a lease was afterwards actually prepared and drawn by counsel, though never sealed or signed by the parties; which circumstance alone is sufficient to take it out of the general class of cases, and amounts to evidence of the most positive kind that the agreement was not intended to operate as a present demise. To the same head, perhaps, may also be referred the case of *Burghes v. Bowman*, (c) where there was an agreement to take a house for the yearly rent of 50*l.*, and the plaintiff to repair. A lease to be drawn by St. Thomas's day and the lease then to begin; and another agreement was made by notes, to let for seven or eleven years at the lessee's election, to be engrossed. And it was stated, that no lease was en-

(a) 1 T. R. 735.

(c) 3 Keb. 68.

(b) 1 Noy. 128.

grossed : but the court said, that although the first was a perfect agreement, and could not be surrendered by the subsequent notes of agreement ; yet the latter shewed the intent. And they further held it to be no lease, there being no words of demise ; and if there were, yet covenants being to be inserted, and no certain term mentioned, it was no lease. In *Bentley v. Poole*, (d) Lord Ellenborough observed, that in the abovementioned case of *Goodtitle v. Way* the exact date of the instrument did not appear. It seems, therefore, to follow, that nothing turned upon that circumstance in the judgment of the court. (e).

So in the case of *Doe d. Coore v. Clare*, (f) there were strong circumstances of difference from the ordinary cases which have been mentioned. An instrument on an agreement stamp was made, reciting that in case the grantor should be entitled to certain copyhold premises on the death of another, he would immediately demise them to the lessee ; and declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence from the lord. Here the intention of the parties appeared strongly on the face of the instrument, that it should be executory ; besides which, at the time it was entered into, the grantor was only a reversioner. The estate too was of copyhold tenure ; and to construe it a present demise would have been to create a forfeiture, whereas the parties had cautiously avoided such an event by an express stipulation to procure a licence when the lessor should come into possession. In this case Lord Kenyon mentioned as an additional reason, that the stamp was adapted to an agreement : but this doctrine that the stamp could have any legitimate influence on the construction seems evidently untenable ; for in all questions on stamp duties the sufficiency of the stamp is determined by the construction of the instrument ; and it would be a contradiction to turn round and decide on the quality of the instrument by the amount of the stamp. (g)

In *Doe d. Jackson v. Ashburner*, (h) the words of the agreement were, "that A. shall hold and enjoy ;" and in a subsequent part of the instrument the grantor engaged to give him a lease.

(d) *Supra*, p. 268.

(e) MS. note by Sir W. D. Evans.

(f) 2 T. R. 739.

(g) MS. observation by Sir W. D. Evans.

(h) 5 T. R. 163.

The court admitted that the words "shall enjoy" were sufficient to constitute a present demise: but they thought the subsequent sentence, "I engage to give him a lease," qualified their effect. In addition to which, the landlord was to acquire an additional piece of ground, without which the lease could not be made. With respect, however, to this last part of the case Sir W. D. Evans thinks it very manifest, comparing Lord Kenyon's observations on it with the whole tenor of his judgment, that he regarded it as a circumstance which, though not immaterial, yet was not so essential as to form the gist of the case, and the principal point in the decision. The different allusions, he continues, in Mr. Justice Ashurst's observations in the same case to the collateral circumstances of taking possession and other acts were evidently immaterial to the conclusion on the real point in the case, that the instrument in question was not to be considered as a lease. Some expressions of a similar nature have been adverted to in the case of *Baxter v. Brown*.^(k) But these *dicta* should be very severely weighed before they are allowed to have any influence in other cases. That the effect and operation of an instrument, as depending on the question of construction, may be materially influenced by the subject matter to which it is applied, as in the case of copyhold estates beforementioned, is a proposition which may be readily assented to. That the relation in which parties previously stand to each other may furnish a ground for varying the ordinary and general meaning of expressions in acts passing between them is also a doctrine which appears to be perfectly reasonable. But that taking possession, or other acts of an analogous nature, should have a similar effect, is a question of a very different nature. The true way of bringing any proposition depending upon the rules of the common law to the test, is to reduce it into the form of special pleading. This, with reference to the particular question, might be done by an action of trespass by the landlord, to which the tenant pleads title as derived from the instrument in question, setting it forth *verbatim*. In case the plea of a lease could not be sustained on demurrer, as not being a lease by the terms of the instrument,—could the defect be removed by stating

(k) *Supra*, p. 266.

the additional fact, that the defendant had entered by virtue of such lease by the permission of the plaintiff? (*l*)

So where (*m*) articles of agreement were drawn up between A. and B. in this manner : first, the said A. is contented to demise to the said B. from Michaelmas next, for six years ; and after these words, a rent was reserved of 100*l. per annum*, together with a re-entry for nonpayment, with several special covenants ; and these articles were sealed and delivered ; yet they were considered as not amounting to a lease chiefly, as it appears, because the word *contented* was held to import only an approbation of something to be done after. This case is cited in another book (*n*) in this manner : if one covenants and grants with another that he shall have and hold such land for ten years, this is no lease, because it sounds only in covenant. This distinction, however, has been considered erroneous ; and seems to be contradicted by the abovementioned case of *Doe v. Ashburner*.

In a late case (*o*) of articles of agreement, there was a stipulation, that out of the rent mentioned in the agreement there should be a proportionate abatement, in respect of certain premises to be excepted out of those demised ; and that the tenant should hold at and under the usual covenants between landlord and tenant, where the premises were situated. As there were strong circumstances of inconvenience, if such an instrument should be considered a lease, it was inferred to be an agreement only ; for it might be disputed what were the usual covenants in the country where the premises were situated ; and, until the rent was apportioned for the accepted premises, the lessor could not distrain because the rent would be uncertain for the rest. As this case contains views very different from those which were entertained in *Poole v. Bentley*, which had been decided recently before, and was cited in the argument, although not referred to by the court, it will be important to detail more fully the observations of the court. It was argued by the counsel for the party, who insisted upon the instrument operating only as an agreement, that the intention of the parties was to be collected not merely from the contents of the instrument, but from all auxiliary circumstances,

(*l*) MS. note by Sir W. D. Evans.

(*n*) Cro. Jac. 172.

(*m*) *Pleasant v. Higham*, 1 Roll. Abr. 848.

(*o*) *Morgan d. Dowding v. Blisell*, 3 Taunt. 65.

This part of the argument was founded upon some facts which were stated respecting the procuring the instrument in question to be stamped. On the other side it was said, that every instrument in writing must speak for itself; and the intention of the parties cannot be tried by parol evidence, or any acts or matter out of the instrument. The court interposing, relieved the counsel from this part of the argument: the only thing to be considered, was the intention of the parties at the time of executing the contract as therein expressed. In the course of the discussion of the principal question Lawrence, J. said, The argument is not that no farther instrument was intended: but that the first instrument conveys an interest as a lease, and that the future lease was in the nature of further assurance. The opinion of the court was delivered by Sir J. Mansfield, C. J. This sort of question which we are about to decide is an extremely unpleasant one. The good sense is with the modern cases: when the party enters into that which on the face of it appears to be an agreement, though there are words of present demise; (*p*) yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only. It is true that in most of these cases there have been positive agreements for a future lease, and that there is none such here:—but the real question is, what did these parties intend? Now the plaintiff's lessor agrees to let to the defendant, (not using the strong words which were used in *Barry v. Nugent* and in other cases,) all that farm except, &c.; and he goes on to make particular provisions; and then he says, at the yearly rent of 226*l.*, and with all usual covenants and agreements as between landlord and tenant, where the premises are situate: this is not the language in which a lawyer would introduce into a lease the technical covenant for further assurance; (*q*) but contemplated the entire making of an original lease. Then follows a partial apportionment of the rent from

(*p*) Of this position Sir W. D. Evans questions the accuracy. In its literal acceptation there is no authority for it except in *Sturgeon v. Painter*. The learned Judge, he conjectures, most probably intended to allude only to those equivocal expressions of an agreement to enjoy, which

per se, and unaccompanied by special circumstances, are allowed to operate as a demise. MS. note.

(*q*) MS. note by Sir W. D. Evans. I conceive there never was an instance of a lawyer introducing this covenant into a common farming lease.

Michaelmas to Christmas, which I do not understand, for the date is the 2d of October: but then comes an apportionment of the rent for the excepted premises. Now, do these words imply or not that one of the parties should grant and the other accept a future lease? Would any landlord or tenant of common sense enter into a term for twenty-one years, without ascertaining what were the terms on the one side and on the other, by which they were to be bound for twenty-one years, and what was to be the rent apportioned for the excepted premises? The landlord thinks he is injured by a breach of covenant, and brings an action; and when it is to be gone into:—what are the usual covenants according to the custom of the country? In like manner they must go to a jury, to see what is the rent of the excepted land. Does not this agreement clearly imply that the parties meant to have a lease? The landlord did not mean that the tenant should hold; nor did the tenant mean that the landlord should have the rent without previously ascertaining what was the rent, and what were the terms under which he should hold. We must presume, therefore, that they meant to have a further lease: and then, according to the modern cases, no interest is conveyed under this instrument. (r) And it would be a very wise rule that wherever one person is about to grant and another to take a lease, until the lease was executed, no interest at law should pass. As to the question, what are usual covenants, it is an endless source of litigation. I have known parties long hung up at an enquiry before the master in chancery, what are the usual covenants; and it is the extreme of folly either to give or take possession under such an agreement, till the lease is executed: but the convenience of the parties sometimes requires it.

In the case of *Doe d. Bromfield v. Smith*, (s) which preceded *Poole v. Bentley*, A. agreed to let her house during her life to B. supposing it to be occupied by B., or a tenant agreeable to A.; and a clause was to be added to give A.'s son the option to occupy the house when of age. No other lease was prepared: in pursuance of this agreement B. took possession of the premises, and occupied them himself under the agreement till his death, and

(r) MS. note by Sir W. D. Evans.

tenancy at will.

I conceive the learned Judge did not mean to exclude the existence of a

(s) 6 East, 530.

paid the rent and taxes. The defendant was his widow and executor, and continued to occupy after his death. After the case had been opened at the bar, and Reader of counsel for the plaintiff assuming, for the sake of argument, that this was a lease was proceeding to shew that it was not a lease absolute for the life of A., but only during the joint lives of A. and B., and consequently that the interest expired at B.'s death. The Court, referring to that part of the agreement which stipulated for a " clause to be added in the lease," were decidedly of opinion that those words importing that something ulterior the agreement was to be done by way of a regular lease, shewed the intention of the parties to be, that the writing in question should operate only as an agreement for a lease, and not as a lease itself. And Lord Ellenborough, C. J. referred to *Goodtitle v. Way*.

The last case which shall be noticed under this head is that of *Tempest v. Rawlins*.^(t) An instrument was executed on the 24th of March, 1807, upon an agreement stamp, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant. That the term was to be from year to year, the lands to be entered upon on the 3d of February 1808, and the housing on the 12th of May; and that a lease was to be made on these conditions with the usual covenants: at the foot of which the defendant wrote, " I agree to take lot 1. (the premises in question) at the rent, and subject to the covenants, &c." Lord Ellenborough, C. J. said that this was nothing more than an agreement for a lease; and time was given to prepare it before the term was to commence. In *Poole v. Bentley*,^(u) the tenant was to have immediate possession, and lay out money in building, and the rent was to commence immediately: but here there was no immediate occupation to be taken by the tenant.

The great difficulty, observes Sir W. D. Evans, at coming to a general legal conclusion upon the result of all the cases which have been detailed, is entirely occasioned by the two cases of *Poole v. Bentley*, and *Doe v. Groves*: for, placing those cases out of the question, the following propositions might be fairly laid down as deduced from the authorities on the subject, 1. That an

(t) 13 East, 18.

(u) 12 East, 168, and see *ante*.

agreement that a person shall enjoy any lands for a particular term, unless controlled by other expressions, or by adventitious circumstances, operates as an immediate lease. (x) 2. That an instrument containing direct words of present demise operates as a lease, although an intention is expressed of executing a lease to be afterwards prepared. (y) 3. That an agreement for the enjoyment of lands generally, and that a lease shall be executed, operate only as an executory agreement in respect of the term intended to be demised. (z) 4. That the intention that an instrument shall operate only as an executory agreement, to be perfected by an actual lease, may be inferred from the general tenor of its contents; although such intention is not expressed. (a) 5. That an agreement for giving possession at a time previous to the time appointed for the execution of an intended lease does not change the effect of the instrument so as to render that which would otherwise amount only to an agreement operative as an actual lease.

The following observations from the same learned authority are well worthy the attention of the profession. Upon this, observes Sir W. D. Evans, as upon many other subjects, it is very formally stated that the operation of an instrument depends on the intention of the parties: but this general doctrine seldom affords any material assistance in coming to a true conclusion upon the merits of a particular case; the fact of the intention, as deduced through the proper *media* of proof, being the very question to be decided: or, in other words, it is a fact, the existence of which, in support of one or the other of the conflicting propositions, is not to be assumed as the basis of the argument, but established on the result of it. An attentive observer of the course of legal proceedings will be often struck with the frequent practice of inferring certain intentions to have existed in the minds of individuals, as deduced by a course of argument purely technical, from premises which no person can safely believe to have been contemplated by the individual, whose act is the subject of the enquiry, as being in any way connected with such a conclusion. In relation to the immediate subject, the true question of intention is,

(x) *Doc v. Ashburner*, 5 T. R. 163.

(y) *Barry v. Nugent*, cited *ib.*

(z) *Brughes v. Bowman*, 3 Keb. 68.

(a) *Morgan d. Dowding v. Blissell*,

3 Taunt. 65.

whether it was the object of the parties that the instrument first executed should *per se* constitute an efficient title for the whole of the term proposed to be demised, so that what is said about a different instrument should be merely in the nature of an engagement for a further assurance to the tenant, or whether the act was intended only to be executory, and upon which no title should be acquired until the completion of the ulterior instrument. With reference to actual probability of the fact in particular cases, as detached from all artificial reasoning, I conceive that in almost all cases upon the subject the title was intended to be only prospective: the inconveniences which would result in general from treating the first agreement as an executed title are strongly marked by Sir J. Mansfield in *Morgan v. Blissell*, and in the notes subjoined to the cases of *Poole v. Bentley* and *Doe v. Groves* I have referred to circumstances which might render such a construction very detrimental to the lessor. The supposition in *Poole v. Bentley* that the future lease was contemplated principally with a view to the making a more particular description for the convenience of assigning or underletting is far from satisfactory, as very little difficulty would occur in an assignment or underlease in describing the premises by dimensions and boundaries; and there would be still less difficulty of description after the houses were erected. The more probable reason of the delay in such cases is, the unwillingness of the lessor to part with the legal title of the land, on the mere assumption of a speculating builder, before any such erections are complete, or any fair or real and efficient security for the payment of the stipulated rent. An intention or an agreement that there shall be an immediate enjoyment, although sufficient to operate as a lease where there are no circumstances to warrant an opposite construction, by no means necessarily proves the existence of an intention to constitute an immediate legal demise of a larger estate than a tenancy at will; for without having that effect, as operating *in rem*, the act may have a complete and perfect execution as an agreement, the breach of which may be the object of compensation in damages (as in the copyhold cases already mentioned). The violation of the agreement may also be prevented by the injunction of a court of equity, to the jurisdiction of which it peculiarly belongs to give full effect to the intention of the parties with respect to executory contracts, and which in all cases

where the contract is admitted to be of that description, while it secures the intended lessee from any infraction of his stipulated rights, if he adheres to the performance of the concomitant obligations, can also protect the lessor from the inconveniences to which he would be subjected, by considering his property as fixed and bound by the terms of his agreement, while he has no efficient security for the maintenance of his rights. This view of the subject may not be unworthy of the attention of a court of law: for although the practice, which once existed from an anxiety to administer substantial justice to give the effect of equitable remedies to legal proceedings, has been for very adequate reasons abandoned; there can be no reasonable ground of objection to a court of law taking incidental notice of the jurisdiction and proceedings of courts of equity with a view to ascertain the intention of parties in deciding upon the question whether a given instrument shall be regarded as an executed title, or an executory contract.

In a recent case in replevin it appeared, that (b) on the 19th of March 1819, the following memorandum of agreement was entered into. "Memorandum of agreement between A. and B. A. agrees to let on lease with purchasing clause for the term of 21 years all that house and premises, &c. entering on the said premises by the said B. any time on or before the 11th day of February 1820, at the net clear rent of 63*l.* per year; and to keep all premises in as good repair as when taken to, (reasonable wear allowed) *paying on entry 50*l.* in ready cash*, and the rent payable quarterly. The term for seven, fourteen, or twenty-one years, which term B. is to give one clear year's notice, before the expiration of either of the above terms for years, if he intends to leave; if he purchases before expiration of the term, B. to pay 1000 guineas." The plaintiff paid the 50*l.* on the 10th of February, but did not enter till April. In March preceding a lease had been tendered to the defendant to execute, which he refused to do; saying he could not grant one. No rent had been paid. Held clearly to be an agreement, and not an actual demise.

In conclusion it should be observed, that agreements for leases ought never to be relied on, since it has been determined that the trustee of a term to satisfy creditors not having notice, may

(b) *Dunk v. Hunter*, 5 B. and A. 322.

maintain an action of ejectment against a tenant in possession under a previous agreement. (c) So if a tenant continue in possession after his lease is expired, pending an agreement to renew, he is nevertheless a tenant by sufferance only, and may be turned out without notice. (d)

(c) *Goodtitle d. Estwick v. Way*,
1 T. R. 735.

(d) *Doe d. Hollingsworth v. Sten-*
nett, 2 Esp. N. P. C. 716.

CHAPTER III.

ON THE CONSTRUCTION AND EXECUTION OF LEASES.

BY the statute of frauds (a) it has been enacted that all leases, estates, interests of freehold or terms for years, or any uncertain interest in any lands, tenements, or hereditaments, made by livery and seisin only, or by parol and not put into writing, and signed by the parties so making the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only ; and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates, or any former law or usage to the contrary notwithstanding. The second section of the statute makes an exception in favour of leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two third parts at least of the full improved value of the thing demised.

Upon this statute it may be remarked that what was considered a tenancy at will at the time of the making of the statute is now considered to enure as a tenancy from year to year ; parol leases therefore, which are not saved by the exception of the second section, will notwithstanding enure as tenancies from year to year, the meaning of the statute being only that they should not enure as terms. (b) On the same principle, although a parol lease be void by the statute, yet in other respects the tenancy will be regulated according to the terms of the lease : it has been deter-

(a) Stat. 29 Ch. II. c. 3. s. 1. Irish De Medina v. Polson, 1 Holt. N.P.C. Act, 7 W. III. c. 12. s. 1. 47.

(b) Clayton v. Blakely, 8 T. R. 3.

mined, therefore, that if it be agreed that the tenant shall quit at Candlemas, the landlord cannot determine his tenancy before: (c) It seems also to follow that a lease for three years, to commence *in futuro*, must be in writing in order to be valid as a term; (d) because the time of making a parol lease must be understood to be the time of the agreement. If the lease therefore is for more than three years from that time, it must be in writing according to the strict letter of that statute. Parol leases, however, to begin *in futuro*, if for a less term than three years from the making, may be good. Those which are to be executed within one year from the making are not within either the present section, or the fourth section of the statute; those which are not to be performed within the year, although they are voidable before entry, as being merely executory agreements, are good after possession taken on the ground of part execution. (e)

In the case of *Roe d. Bree v. Lees*, (f) Mr. Serjeant Hill is reported to have contended that, in spite of this statute, by the common law where a farm lies in open fields, one of which is fallowed every year, and a tenant takes the farm generally, he is tenant for three years; and if he hold over, that he is tenant for other three years. 2dly, that where part of a farm is inclosed, and part common field land, and the whole is let at the same time and at the same rent, the common field land shall draw to it the inclosed part; and as it would be unjust to turn the tenant out of the common field land before the round of husbandry is complete, he shall keep the inclosures also; and a case was cited to that effect: but the court inclined against this doctrine. In the principal case the inclosed part formed the bulk of the premises; and since that was the case De Grey, C. J. said, he did not hesitate to declare that the doctrine maintained by Serjeant Hill was not part of the common law. All leases for uncertain terms were *prima facie* leases at will; it was the reservation of annual rents which turned them into leases from year to year. It was possible, he observed, that circumstances might make it a lease for a longer term; as where the crop (as of liquorice, madder, &c.) does not

(c) *Doe d. Rigge v. Bell*, 5 T. R.

471. *Doe d. Collins v. Weller*, 7 T. R.

478. *Roe d. Jordan v. Ward*, 1 H. Bl.

97.

(d) *Rawlins v. Turner*, 1 Ld. Raym.

736.

(e) See *ante*, 271.

(f) 2 Blackst. 1171.

come to perfection within the year; and he would not say that the nature of the ground or the course of husbandry might not deserve to be considered when such a case came nakedly before the court. As to a custom of this kind it was not stated to be immemorial; neither was it likely to be so, for such takings were comparatively of modern date. Mr. J. Blackstone added, that when a case of mere common field land occurred, it might be worth while to consider if the course of husbandry should govern the duration of the lease:—but how came it that in all the cases in the books from the time of Henry the Eighth, when inclosures were little known, to the present time, such takings were determined only to be for one year? And where the course of husbandry is not finished under four years, as in Berkshire and other rich countries, how can a general parol taking be construed a lease for four years consistently with the statute of frauds?

With reference to the observations of Lord Kenyon in *Clayton v. Blakey* before cited, (g) Sir W. D. Evans observes, It would have been a more accurate statement to have said that an agreement which was formerly held to constitute only a tenancy at will had since been construed to amount to a tenancy from year to year; because it would have indicated the difference between construing the acts and intentions of the parties, and controlling the authority of the legislature. Some very strong observations, he adds, are made upon the assumption of authority involved in the above decision by Mr. Watkins in his learned *Treatise on Conveyancing*. The late Editors of that work observe, that the grounds of the determination appear to be that the object of the statute was principally to render invalid any parol agreement for a larger term than three years: and as the constructive tenancy from year to year, arising from the mere possession at an annual rent was not then established, it could only refer to a tenancy at will, when it avoided the agreement between the parties: but after the tenancy from year to year was raised by implication of law from the acts of the parties, the courts did not feel that they violated the intention of the statute by giving the same effect to the possession and payment of rent by a person who entered under a parol lease void by the statute, which they would have done had the same circum-

(g) pp. 282, 283.

stances occurred unconnected with such parol lease; and they therefore felt themselves bound by the prior decisions to put the same construction upon those circumstances, as evidence to infer an agreement for a tenancy from year to year, notwithstanding the agreement between the parties; in consequence of which the statute could not be taken into consideration. They did not, therefore, give any effect to a parol lease, which the statute had made null: but merely presumed consistently with their decisions in other cases, an agreement for a different kind of tenancy when the facts of the case would admit that construction. It would seem, therefore, in conformity with these principles, that they would construe a possession taken under a parol lease void by the statute as a strict tenancy at will, where no act is done by the lessor, by acceptance of rent or otherwise, to raise by implication a tenancy from year to year. Sir W. D. Evans, however, entertains considerable doubts whether the courts would act upon the distinction just referred to; and certainly Lord Kenyon does not in his opinion profess to proceed upon any such ground, but upon the actual construction to be given to the words of the statute itself. It is proper, however, to notice that Lord Ellenborough, C. J., in a case (A) in which the decision in *Clayton v. Blakey* was referred to, observed that the rent had been received, which raised an implied tenancy from year to year, though the tenant had been let in under an invalid lease. But this observation was entirely collateral to the principal point in that case. It is true, continues Sir W. D. Evans, treating the subject as matter of reasoning (for I doubt whether for any practical purpose it would be possible to shake a decision, which has at least the benefit of convenience,) that the statute does not profess to render the act of the parties null and void, but only to qualify and restrain it, reducing the effect of such act to the creation of an estate, which was at the time of general occurrence, and attended with several important legal incidents; and which, although now fallen into comparative disuse, may be very reasonably constituted by express agreement between the parties; as for instance, in the case of a gentleman going abroad, and letting his house at an inadequate rent, upon an agreement that it shall be restored to him whenever his own convenience requires it. But tenancies from year to

(A) *Thurston d. Weaver v. Belcher*, 5 East 449.

year by express agreement were by no means unfrequent at the time of passing the statute of frauds. They were evidently the subject of judicial discussion on incidental points in the reign of William, (i) and are referred to as familiarly known at a much earlier period. (k) The subsequent alteration has not consisted in the introduction of such estates: but in inferring an intention of the parties that they should be actually created under circumstances under which no such inference would have been formerly made; and probably some confusion has arisen from not properly adverting to the distinctions between fact and law. If the point had come formally before any court in the shape of a special verdict; that A. by parol agreed to demise to B. for seven years; and that B. had entered in pursuance of such agreement, it is probable that the direct and literal operation of the statute as constituting in such a case a proper tenancy at will would have prevailed over the consideration that a tenancy for a term not expressed, at an annual rent, had been in recent practice generally regarded as evidence of an agreement between the parties to constitute a tenancy from year to year. It is observable, that in an earlier case (l) before Lord Kenyon it was taken for granted, both by the counsel and the court; that a tenant under a parol agreement for four years was only tenant at will; and the ground of the decision against the plaintiff was that the demise in the ejectment was laid at an earlier day than the demand of the possession.

Leases intended to be rendered null and void by the first section of the statute of frauds are the same as those which come within the exception of the second section, namely, leases upon which a rent is reserved. If no rent is reserved, or no rent equal to two-thirds of the improved value of the land, there, although the possessory interest contracted for be for a portion of time less than three years from the making, it must be in writing, because in the latter case it is not within the exception of the second section, and in the former if the consideration be paid by way of fine the contract assumes a different form, and is in the nature of a sale of an interest in land within the 4th sect. of the same statute, which extends to sales as well as agreements for leases. So also in the case of *Crosby v.*

(i) *Bellasis v. Burbrick*, 2 Salk. 209. 301.
Stomfil v. Hicks, 2 Salk. 413.

(k) *Lady Montague's case*, Cro. Jac. (l) *Goodtitle d. Galloway v. Herbert*, 4 T. B. 680.

Wadsworth (*m*) the purchase of the growing crop of grass in a field, although it gave the possession only for a limited purpose, was held to be the purchase of an interest in the land within this section of the statute; for the purchaser was entitled to the full enjoyment of the crop growing on the land, during the proper period of its growth; and he might, in respect of such exclusive right, maintain any possessory action against persons doing acts in violation of it; it was consequently voidable by parol notice from the owner before any part execution, if not reduced into writing. (*n*) So of growing turnips, their maturity not being stated. (*o*) On the same principle an agreement in writing for the sale of all the hops which should be growing on a certain number of acres of lands, to be delivered in pockets at a certain place, was held not to be within the exception of the stamp act, 23 Geo. III. c. 58. as the sale of goods, wares, and merchandise. (*p*) This agreement was something more than a contract to deliver goods, wares, and merchandise, at a future time; it gave the vendee an interest in the whole produce of that part of the vendor's ground which consisted of hop grounds. If the vendor had grubbed up his hops, or refused to gather or dry them, it would have been a breach of the contract. But where (*q*) the owner of a close cropped with potatoes made a contract on the twenty-first of November when all vegetation may be supposed to have ceased altogether, to sell them at so much a sack, the vendee to get them out immediately, this was held not within the fourth section of the statute: for it is no contract for any interest in land, but the land is merely a warehouse for the potatoes till they are removed by the vendee.

One case, (*r*) however, seems to have been decided on a different principle, where it appeared that the plaintiff being possessed of certain pieces of fen land, which he was desirous of bringing into cultivation, made a parol agreement to let them to the defendant without rent, who was to plow, dress, and sow them for two successive crops, and in lieu of rent to allow the plaintiff

(*m*) 6 East. 602.

(*n*) Co. Litt. 4 b. Fitzh. Trespass 49. Bro. Trespass 273. Wilson v. Mackreth, 3 Burr. 1828.

(*o*) Emmerson v. Heelis, 2 Taunt. 28.

(*p*) Waddington v. Bristow, 2 Bos.

and P. 452.

(*q*) Parker v. Staniland, 11 East, 362. Warwick v. Bruce, 2 M. and S. 205.

(*r*) Poulter v. Killingbreck, 1 Bos. and P. 397.

a moiety of the crops; the form of action being *indebitatus assumpsit*, it appeared that, while the crops of the second year were on the ground, an appraisement had been taken for both parties, and the value ascertained. Eyre, C. J. said that the circumstance of the appraisement put an end to the case; for the special agreement was executed by the appraisement. The appraisement amounted to clear proof that the plaintiff sold what the defendant admitted to be his; and the price being ascertained brought this to the case of goods sold and delivered.

Collateral agreements are not within the statute: therefore where (s) the lessee of a house and his partner in trade agreed to pay the lessor annually during the rest of the term 10*l.* *per cent.* for the use of certain buildings, if the lessor would erect them; it was held that it need not be in writing. The original lease still existed; and this new contract was held to be no demise of the premises: only the original rent could be distrained for, because this was only a collateral agreement to pay so much more during the term, in consideration of the proposed expenditure. The court however thought that, although the lessee's partner quitted the premises, the landlord was bound by the agreement during the term.

A mere easement in lands and tenements is not an interest in land within the statute. Agreements, therefore, for the liberty of using a way over another's field, or for stacking hay or corn on his close, (t) or for nailing the framework of a skylight against his wall, (v) are good without writing.

Where the wife, executrix of her husband, promised by parol to pay the arrears of rent due at his death, and also the further sum of 260*l.* in consideration of permission to enjoy till Lady-day: this was held to be an entire agreement; and the parol promise to pay the debt of her husband, being void by that part of the fourth section of the statute of frauds which enacts that no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate, without a writing to that effect, the other part, although not strictly within the statute, was void also. The action was brought for

(s) *Hoby v. Roebuck*, 7 Taunt. 157.

(t) *Wood v. Lake*, 5 Bay. 3.

(v) *Winter v. Brockwell*, 8 East 210. n. s. *Webb v. Paternoster*, Palm. 71.

See *Phill. Ev.* 438, 4th edit.

both sums; and, therefore, the court could not hold otherwise without a variance from the promise. (u)

In parol leases the terms cannot necessarily be so precise as in those made in writing: but the principal features of a lease, such as the term, the rent and the commencement, must be explicitly ascertained by the parties. Further than this nothing but delivery or waiver of the possession is necessary to the completion of the contract. If, however, a tenant verbally agree to hold over after the expiration of a written lease, nothing more being expressed, he is presumed to hold under the covenants of the former lease as far as they are applicable to his present situation, (v) But a parol agreement to hold over will not discharge a covenant in a lease to deliver up the premises at the end of a term, because that would operate as a parol release of an instrument under seal. (x)

The preceding remarks must be understood only of corporeal hereditaments, which were said at the common law to lie in livery; because, the common law mode of transfer being by some notorious and public act, such as delivery of seisin, a writing was considered not essential to the conveyance. Incorporeal hereditaments, also, may pass without writing as appendant or annexed to things corporeal, as advowsons appendant to a manor and tithes with a rectory: but, in general, incorporeal hereditaments in gross cannot be transferred without a deed. They are said to lie in grant; and in most cases a deed seems to be essential to the lease of them. (y) Tithes seem to have been considered an exception to the rule in some cases. A parol agreement between a parson and his parishioner, for instance, for a retainer of tithes seems to be good for one year: but then it seems that the corn or other titheable matter, the subject of the agreement, should be in *esse*; in which case the agreement rather resembles the sale of a chattel in *esse*. (z)

(u) Lord Lexington v. Clark, 2 Ventr. 223.

(v) Digby v. Atkinson, 4 Campb. 275.

(x) Man v. Rainsborough, 2 Keb. 99. Per Windham, J.

(y) Rolls v. Boulting, Cro. Jac. 360. The King v. Ellis, 3 Price Exch. Rep. 323.

(z) Compl. Incumb. 337, *et seq.* Bellamy and Balthorp's case, Godb. 374.

Snell v. Bennett, Godb. 383. Palm. 377. Small's case, Noy. 121. Bugg v. Woodward, Cro. Eliz. 188. 249. Hawkes v. Brayfield, Cro. Jac. 137. Swadling v. Piers, Cro. Jac. 613. Anon. 2 Brownl. 27. Rex v. Fairclough, 8 Mod. 62. See also Honicomb v. Swete, Cro. Jac. 668. Barnard v. Evans, 1 Lev. 24. Wellock's case, 2 Leon. 72. Chave v. Calmel, 3 Burr. 1873.

With respect to common law leases of copyhold land it is immaterial, with respect to their causing forfeiture, whether they are by parol or in writing : they will equally cause a forfeiture, if a common law interest actually passes. (a)

No particular mode of assurance then is requisite to make a contract valid as a demise : the statute of frauds has only provided that in certain cases the lease shall be in writing ; (b) a deed, therefore, is not necessary, except where the nature of the subject does not admit of any other mode of transfer. Such estates are accordingly created by will in many cases ; and the rent reserved upon them will be payable on the ground of contract to comply with the intention of the testator. (c)

It must, however, be recollected that all leases by the king must be by letters patent ; and no grant can be made to him except by matter of record, or by deed recorded. (d) So all leases to which corporations aggregate are parties must be by deed ; because they cannot grant except under their common seal, or take without deed. On this principle it was held, that where a corporation leased, by a verbal agreement, the tolls of a market, which amounted to more than 10*l.* a year, the lessee gained no settlement, because no interest could pass from a corporation except under their common seal : the pauper had merely a licence to collect. The principle of this case, however, as far as respects the law of settlement, appears to be overruled by the later case of the *King v. All Saints Derby*. (e) In that case a pauper by order of a corporation at a common-hall was allowed the liberty of taking sand and gravel from the bed of a river, to the soil of which the corporation were entitled, with a condition that he should sell to the inhabitants of the town at a certain rate. This was held a tenement, within the acts, for the purpose of gaining a settlement. It was, however, admitted that a corporation could not demise without deed : and Lord Ellenborough, C. J. said, that although he should find a difficulty if the question turned on the demise ; yet, in point of permanency and enjoyment, it must be considered a tenement, because the pauper had been in exclusive occupation with permission of the corporation.

(a) *Saverne v. Smith*, Cro. Car. .

Hodd v. Chalener, Cro. Eliz. 149.

Jackman v. Hoddeaddon, Cro. Eliz. 351.

(b) *Farmer v. Rogers*, 2 Wils. 26.

(c) 2 Bendl. 34.

(d) *Dimock's case*, Lane, 31. 35.

160. *Lane's case*, 2 Rep. 16.

(e) 5 M. & S. 90.

A corporation, indeed, may do an act of record without their common seal, because the records operate by estoppel: but acts *in pais* done by them without deed, have no such effect. (f)

In actions of ejectment it is usual and proper to allege the demise of a corporation to be by deed, and under seal; yet, if it be not so set forth, it will be so intended after verdict: (g) and, although it should be so alleged, it need not be proved in evidence more than in any other case. (h)

Before the statute of frauds, lands in London might have been bargained and sold by word of mouth, without any writing: but since the city of London is not excepted by that statute, the citizens must now bargain and sell land by deed like other people. (i)

I. From the reign of Edward the Sixth to the end of the reign of James the First many decisions will be found relating to the grants of corporations, turning on very nice points, as to the name or title which they assumed in making such grants; and many grants were avoided by very trifling distinctions: but a greater liberality prevails in modern times. It has been accordingly held, that where a corporation in a deed of grant is not described precisely by the name by which they were incorporated, it is open to the judges to inquire whether the corporation in the letters patent, constituting it a corporate body, is the same corporation as that described in the deed; and if the deed should be found to be sealed with the seal of the same corporation, it ought to be considered good and valid. (j) The omission of the founder's name was formerly thought of some importance: but it appears now to be immaterial. (k)

Lord Coke says, that the parishioners, or inhabitants, or *probi homines* of Dale, or churchwardens, are not capable of purchasing lands by that name; but goods they are: but in ancient times, he adds, such grants were allowed. (l) Mr. Hargrave, however, in

(f) The Mayor of Thetford's case, 1 Salk. 192.

(g) Patrick v. Balls, Carth. 390.

(h) Farley d. Corporation of Canterbury v. Wood, 1 Esp. N. P. C. 197. Roe d. Henderson v. Clarke. Peake's N. P. C. 4. Co. Litt. 970. b. n. 1.

(i) Prest. Shep. T. 222. n. 2.

(j) Per Gibbs, C. J. in Croymon

Hospital v. Farley, 6 Taunt. 467. The Mayor of Carlisle v. Blamire, 8 East. 493.

(k) Sherborn v. Lewis. Gouldsb. 120. King's Lynn case, 10 Rep. 132 b. Hayward v. Fulcher, W. Jon. 166. 3 Salk. 102.

(l) Co. Litt. 3. a. Finch's Law, 870. 178. Keilw. 32. a.

a note to this passage, has cited Dy. 100.; the case of a grant by the crown *probis hominibus de Ialington*, rendering rent. So where Queen Elizabeth made a lease to the men of Chesterfield by the name of the aldermen of Chesterfield; although it was held that they had no capacity to grant, yet it was admitted that by the grant of the Queen they had a capacity to take. (m) It is observable however, that both these cases are grants from the crown.

By the stat 9 Geo. I. c. 7. churchwardens are enabled to purchase a workhouse for the poor; and by custom in some places, as in London, the parson and churchwardens are a corporation to purchase land, and in pleading it should be so alleged. (n)

A dean and chapter, or the warden and fellows of a college, may grant or lease by the names of dean and chapter, or master and fellows, without shewing their names as individuals; but parsons and vicars, and all sole corporations, should use their names of baptism. (o)

II. Recitals in leases by common parties are not of much importance, because although there should be a misrecital of a prior lease, or the recital of a lease not in existence, the lease would notwithstanding be construed according to the intention, and take effect with a saving of the rights of third parties: but in letters patent, whether relating to counties palatine or to crown lands properly so called, a correct recital is of the essence of the grant. An error there will vitiate the whole: neither can it be aided by the words "*ex certa scientia, mero motu, et speciali gratia*," for these words merely imply that the grant is voluntary, and do not refer to the certainty of the thing granted. (p) In *Godfrey v. Sparrow*, (q) indeed, an incorrectness as to the recital of a place was held to be immaterial: but in that case the jury found specially by their verdict, that the place in the recital was identically the same as that purported to be granted.

In *Bozon's case*, (r) the following distinctions were taken as to the effect of a clause of *non obstante* in the king's grants. When

(m) The case of the Aldermen of Chesterfield, Cro. Eliz. 35.

(n) — *v. Sherlock*, 3 Keb. 811.

(o) *Newton v. Travers*, 3 Salk. 103.

(p) *Swift v. Heirs, March*, 31. *Wing v. Harris*, Cro. Eliz. 231. *Chambers v. Mason*, Yelv. 42. 47. *Godfrey v.*

Sparrow, 1 Roll. Rep. 23. *Sawyer v. East, Lane*, 108. *Aprice v. Hayes*, Hardr. 498. *The King v. Clarke*, 1 Freem. 172. 1 And. 91.

(q) 1 Roll. Rep. 23.

(r) 4 Rep. 34. *The Attorney-general v. Hungate*, Hardr. 231.

the king by the common law cannot in any manner make a grant, there a *non obstante* of the common law will not make the grant good against the reason of the common law. So where the words are not sufficient *ex vi termini* to pass the thing granted, there also a *non obstante* will not serve: but where the king may lawfully grant, but the common law requires that he be so instructed that he be not deceived, there a *non obstante* supplies it, and makes it good. To these distinctions it may be remarked in addition, that by the stat. 1 W. and M. sess. 2. c. 2. sect. 12., it has been declared, that all dispensations by *non obstante* of any statute are void, unless provided for by the statute itself.

In common leases recitals do not often occur: but where the parties grant in respect of different interests, it is convenient that the nature of such interests should be explained by recitals. In building leases and other grants for long terms, which partake more of the nature of a purchase of a permanent interest in the estate, than of a mere contract for the occupation, the same precautions are requisite with respect to the sufficiency of the title; and the same explanations are desirable with respect to the nature of the estate, from which the interest intended to be granted is derived, as in cases of absolute purchase.

III. Any words which amount to a grant, may be used as operative words of demise. The words "demise, grant, betake, and to farm let," are mentioned by Lord Coke as the most apt and convenient words: (s) but there are many others which are equally proper for that purpose. (t) So although "*feoffavi*" was formerly considered essential to a feoffment; yet it has been long ago held, that "*dedi et concessi*" in a deed may be taken as a feoffment, if accompanied by livery of seisin. (u)

In the case of a lease under the exchequer seal, the words "*sciatis quod nos commissimus custodiam*," of certain lands to certain persons for years, have been considered sufficient, as warranted by the practice of the court of exchequer, of which all others are bound to take notice; and the lessee may plead it as a demise. (x)

If a lease be made by the words "grant, demise, bargain and

(s) Co. Litt. 45. b. 301. b. 4 Inst.

(u) Godb. 128.

111.

(x) Bro. Tit. Lease, 71. 2 Rep. 17. a.

(t) 2 Mod. 250.

Hardr. 340.

sell," or by the words "demise and grant" in consideration of a sum of money, the grantee is at liberty to accept the conveyance, either as a demise at the common law, or as a bargain and sale. (y) But since it has been said, (z) that when a conveyance may take effect either at the common law, or under the statute of uses, it shall operate as a conveyance at the common law, unless the intention of the parties appears to the contrary, if it is the intention of the parties that it should operate as a bargain and sale, the words "bargain and sell" only should be applied to the transfer, in order to avoid any uncertainty as to the operation of the deed. (a)

No underlease or derivative contract, where the lessor has only an estate for years, can take effect by bargain and sale, because the statutes (b) require a seisin to serve the uses, and the owner of a chattel interest can only have the possession which is not sufficient to transfer the use to the bargainee. (c)

IV. The consideration of a deed is a matter of no importance, except so far as it respects the statutes relating to voluntary conveyances: (d) for a want of consideration will not *per se* avoid a deed. And in conveyances to uses which do not operate by transmutation of possession, such as bargains and sales, and covenants to stand seised to uses, in which a consideration is requisite to raise the use, although no consideration be expressed in the deed, it has always been permitted to the party to shew that there was a sufficient consideration for that purpose. So in all other cases, where one consideration is mentioned in a deed, it is always open to shew that there was a different one. (e) And if a lease be made to three persons parties to an indenture, and the consideration be stated to be paid only by one, the land shall notwithstanding pass to all: for it must be intended that the consideration was paid for all, in order that the land should pass to all, according to the intention of the parties. (f)

(y) Heyward's case, 2 Rep. 35. vol. 49, 51.
Fox's case, 8 Rep. 93.

(z) Hinde's case, 4 Rep. 70.

(a) Barker v. Keate, 2 Mod. 252.
Grey v. Edwards, 4 Leon. 110.

(b) Stat. 27 Hen. VIII. c. 10. Irish
Stat. 10 Ch. 1. sess. 2. c. 1. s. 1.

(c) Dy. 369. a. Sanders on Uses, 2

(d) Stat. 13 Eliz. c. 5. Irish Stat. 10
Ch. 1. sess. 2. c. 3. s. 14. Stat. 27 Eliz.
c. 4. Stat. 10 Ch. 1. sess. 2. c. 3. Stat.
3 and 4 W. and M. c. 14.

(e) Rex v. Scammonden, 3 T. R.
474.

(f) 2 Inst. 672.

The terms applied to voluntary alienations by the statutes which have been referred to are "feigned, covinous, and fraudulent:" but it has been long since determined that "fraudulent" in this sense has a much more extensive signification than the common acceptation of the word. Every conveyance which may be considered voluntary, it has been decided, is fraudulent, because voluntary, against creditors and purchasers for valuable consideration, whether with or without notice, by force of these statutes. (g) Marriage is a good consideration, as we have before observed, if the estate is made previous to or upon the celebration of it. So also where, (h) upon and before marriage, A. promised to assure to B., his intended wife, for her jointure 1000*l. per annum*, his estate being then worth 12,000*l. per annum*, and B. married A. before any such assurance was made, and afterwards A. by deed conveyed lands in trust for his wife for 100 years if she should so long live, to commence after his death; and it was indorsed on the deed that the intent was that when there should be a jointure settled according to the first agreement, the lease should be void: the court held that this lease being made in pursuance of the first promise, although there was not then any mention of a lease to be made, was grounded upon a good consideration, and therefore not fraudulent. Upon the same principle, executory articles made previous to marriage will be enforced in equity, against purchasers for valuable consideration: but settlements after marriage, in consideration of natural love and affection, on wife or children are merely voluntary. Any consideration, however, is sufficient to raise a use between the parties, although, as against creditors and purchasers for valuable consideration, such deeds may be impeached.

By the 3 and 4 W. and M. c. 14. s. 5. the heir is made liable for assets by descent, which he may have aliened: but lands, tenements, and hereditaments, aliened *bona fide* before action brought, are not liable to execution for specialty debts.

The statutes of usury will avoid deeds made in evasion of them: but they relate rather to the actual nature of the transaction, than to the construction of the instrument. (i)

(g) Doe d. Otley v. Manning, 9 East 454.

59. See Pickstock v. Lyster, 3 M. and S. 371.

(i) Stat. 12 Ann. stat. 2. c. 16. Irish Stat. 10 Car. I. st. 2. c. 22.

(h) Griffin v. Stanhope, Cro. Jac.

V. It may be useful in this place to insert the general rules of grant, as far as they relate to the subject matter of the grant.

By the grant of land, all that is *supra*, as houses, trees, &c. and all that is *infra*, such as mines, earth, clay, &c. are usually understood to pass: but this rule must be understood with some qualification, when applied to leases. All trees which may be called timber trees are parcel of the inheritance; and the lessee for life or years has only a limited property in them, which extends no farther than the fruit, shade, and loppings. Such property also ceases immediately they are severed from the land: therefore, if timber trees are severed by accident or by a stranger, the lessee has no right to an action *de bonis asportatis* against any for carrying them away; for his property in them is gone by the severance. (k) He is entitled indeed to cut down timber sufficient for repairs; but it is the right of the lessor to point out what trees are fit for cutting, and the lessee must apply such specific trees in repairs; and consequently he is not at liberty to sell them, and apply the produce to the same purpose. (l) The cutting of timber trees on any other pretext is waste, and will subject the lessee to certain penalties which will be hereafter mentioned. But, in general, all other wood which does not come under the denomination of timber, and all underwood, as well as the soil and herbage where the timber trees grow, will pass to the lessee, without any special words of grant, to be used by him for his own benefit during the lease. Neither will any greater interest in the land be transferred, even though the demise should be of the land, together with all manner of timber trees, because the lessee's limited interest is enough to satisfy the words, and the law will not imply any thing to the prejudice of the inheritance. (m)

What shall be considered timber, differs according to the custom of different countries. Oak, elm, and ash, are most commonly so considered. By the custom of Bucks beech is timber; and whenever the custom declares any sort of wood to be timber, it is privileged as timber according to the rules of the common law. Cutting down decayed timber is as much waste as cutting down

(k) *Evans v. Evans*, 2 Campb. 491.

(l) *Lee v. Alston*, 1 Ves. J. 78.

Gower v. Eyre, Coop. Ch. Ca. 154.

Godb. 28. Maleverer v. Spinke, Dy.

35. b. See post the statutes relating to Ireland.

(m) Dy. 374. b. *Moor. 94. 3 Leon. 55.*

any other, although dotards, if severed by accident, as by a tempest, belong to the lessee. (n)

In most counties tenants may cut all trees, whether timber or underwood, which have under the denomination of seasonable wood, or *sylva cædua*, been cut within twenty years: but in wood counties seasonable wood may be cut at six and twenty, eight and twenty, or thirty years. (o) In such counties, especially in Kent, they are in the habit of cutting down wood as underwood, which, if allowed to grow, would be most valuable timber. Such wood is also sometimes called acre wood, and no waste is committed by cutting them at seasonable times. (p)

Hornbeam, willows, or sallows, which never can become timber, may be cut at any age. Blackthorn and whitethorn seem not to be particularly privileged, unless they are very ancient, as sixty or one hundred years old, or are in a meadow or pasture for the shade and nurture of cattle. (q) So it is no waste to stub up thorns and furze in a meadow, if consistent with good husbandry: (r) but although the lessee may cut down the underwood of hazle, willows, and thorns; yet if he suffer the germins to be eaten by cattle, or cut at unseasonable times, and not according to the custom of the country, or if he dig them up wantonly by the roots, it is waste. So it is no waste to cut a quickset hedge, but rather good husbandry, because it will grow better: but to stub it up is destruction. (s) So cutting down willows on the bank of a river, in consequence of which the banks fall down, and the river overflows a meadow, is waste. (t) On the same principle, although the lessee has a special interest in timber trees, so as to lop or shroud them: yet it is waste if he do it at unseasonable times, or so as to injure the tree considered as timber.

If a stranger enters and cuts them, the lessor and lessee have each his separate action of trespass, for the distinct injury done to each. If the lessor cuts them, the lessee may have his action of trespass against him, and will be entitled to treble damages; (u)

(n) See 3 Atk. 95. *Herlakenden's* case, 4 Rep. 63. b.

(o) Godb. 4.

(p) *Brook v. Cobb*, 2 Brownl. 150. See stat. 45 Edw. III. c. 3, and *Ford v. Raester*, 4 M. and S. 130.

(q) Dy. 35. b. in marg. pl. 23. *Moyle v. Mayle*, Ow. 66.

(r) Dy. 37. a.

(s) *Gage v. Smith*, Godb. 209.

(t) *Stripping's case*, Winch. 15.

(u) *Lifford's case*, 11 Rep. 48. *Foster v. Spooner*, Cro. Eliz. 18. *Samuel v. Johnson*, Dy. 65. a. *Talbot v. Woodhouse*, 2 Lutw. 1480.

and if the lessor sell the trees without the special licence of the lessee, and after the vendee has cut down and removed them, the cattle of the lessee destroy the young shoots, there is no waste, because the selling and cutting the trees was the lessor's own wrong : he therefore could not compel the lessee to inclose the part cut for the benefit of the young germins. (x)

A copyholder cannot bar the lord of the manor of his right to cut timber by making a common law lease ; neither can he transfer a customary right, if any, to cut timber for repair. The lessee, therefore, of a copyholder can have no action of trespass against the landlord for cutting timber, although he do not leave sufficient for repair, and although it is the custom that the copyholder should cut timber for repair. (y)

If a house fall by tempest, the lessee has a special interest in the timber to rebuild : but if the lessee pull down the house, it is said that the lessor is entitled to the timber as parcel of the inheritance in which the lessee's interest is determined, and shall also have his action of waste. (z)

A distinction prevails with regard to mines similar to that which has been mentioned respecting trees. Mines are so uncertain in the prospect they hold out of profit, and so much injury might be done to the inheritance by indulging the cupidity of speculators, that opening mines by the lessee has also been classed under the head of waste. And where (a) a lease was made of lands with mines, profits, &c., and in the land demised there were open mines, the court inclined to Lord Coke's (b) opinion, that only such mines as were opened passed : but afterwards it appeared that the word "mines" was not in the grant ; and then they held clearly, according to Saunders' case, (c) that the lessee could not open new mines.

If no mines are opened, and the lessor grant all mines, the lessee may open new mines since the grant can no otherwise take effect. So also it is said that if a man have land in part of which there is a coal-mine appearing, and he demise the land for life or years, the lessee may dig for coal, because it shall be intended that the lessor meant all the profit of the land to pass. (d)

(x) Moor. 9 pl. 24. Dy. 35 b. in 36.

marg.

(y) Ashmond v. Ranger, 12 Mod. 378.

(z) Herlakenden's case, *supra*. Dy.

(a) Astrey v. Ballard, 1 Freem. 444.

(b) Co. Litt. 54. a.

(c) 5 Rep. 12.

(d) Saunders' case, *supra*.

Where (c) there is a lease of coal-mines in a manor opened and to be opened, this does not give the lessee a power of opening mines in the lands of copyholders : but if the lessor or any other person enters into the copyhold lands, and digs a new pit during the estate of the copyholder, and takes the coals and converts them to his own use, it has been held that the lessee may maintain trover for them.

This rule respecting mines is also extended to quarries and gravel pits, or any other excavation of the soil. It is waste therefore to dig for stones except in an ancient quarry, although the lessee fill up the holes again. So it is said to be waste in Lancashire to dig marl, except it be employed on the land. (f) Special agreements are therefore usually made on these points ; and it becomes in such cases a question of intention upon the words of the instrument. Where, (g) for instance there was a covenant in a lease that the lessee should not dig gravel out of any part of the demised premises, without consent of the lessor, or paying 10*l.* per load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the occupation of A. B., and by indorsement before execution it was agreed that it should be lawful for the lessor to let any part of the premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre which he should so let, and further that it should be lawful for the lessee to break up and dig for gravel in any part of the demised premises, he covenanting to pay the lessor 20*l.* for every acre he should break or dig, at or before the expiration of the time, and to make good the same ; it was held that the lessee was not entitled to dig in the two acres of garden ground without making them good ; for the memorandum was in general terms, and extended to every part of the land demised. So where (h) land was demised at an annual rent, with liberty to dig half an acre of brick earth annually, and the lessee covenanted that he would not dig more, and that if he did that he would pay an increased rent ; a stranger having dug and took away brick earth, it was held that the lessee, after he had recovered the full value against the stranger, was entitled to retain the whole damages against the

(c) *Player v. Roberts*, W. Jon. 244.(g) *Flint v. Brandon*, 1 N. R. 73.(f) *Moyle v. Moyle*, Ow. 66. Per Walmsley, J.(h) *Attersol v. Stevens*, 1 Taunt.

lessor. In this case the lessor claimed part of the damages as for an injury to his reversion ; and contended that this was not a transfer of the soil to the tenant, but only a privilege of taking it on paying an increased rent ; and that as long as he did not use it the land belonged to the landlord. It must be confessed the case is not without difficulty : but the court held that as between the lessee and a stranger, the lessee had the possessory right, and that this agreement was in effect a sale of so much brick earth, with a liberty of taking more on paying an increased rent. And although the lessee had not elected the spot from which he would dig ; yet, the instant the stranger dug, he had a right to say, that the spot where the stranger dug was the spot chosen by him ; and the consequence of the action against the stranger as between the lessor and lessee was, that the earth taken must be considered as taken by the lessee. (i) *Chambre, J.* took a different view of the case from the rest of the court. The plaintiff, he observed, at the time of the trespass had the possessory right : besides this he had the privilege of digging half an acre of brick earth without any additional rent ; and further, on making further compensation, he might dig more than half an acre. By exercising these privileges, and severing the brick earth from the soil and freehold, he would become a purchaser ; and the covenant would protect him from the consequences of what otherwise would be waste : but, until the earth was severed, the soil and freehold remained in the lessor. It appeared to him, therefore, that the lessee's beneficial interest was no more than the difference between the value of the earth taken by the stranger, and the price that the lessee must have paid if he had taken it himself. All the remaining interest belonged to the reversioner, who, as he conceived, could maintain no action against the plaintiff for the rent or compensation agreed upon by the covenant, in respect of brick earth not dug up or taken by the plaintiff or for him, but by a stranger against his will : for which act, so far as it affects the inheritance, the compensation was due to the reversioner only, and his remedy was by action on the case against the stranger. In this view of the case the learned judge was evidently led away by the analogy he conceived to exist between this, and more obvious cases of injuries to the inheritance

(i) *Bassett v. Maynard*, Cro. Eliz. 819. *Palmer's case*, 3 Rep. 25. b. Res. 2.

during the possession of the tenant. For instance, where a stranger cuts down timber trees, both the tenant and the reversioner has each his separate action, the one for the injury done to the inheritance, and the other for the loss of the shade and loppings. But the court drew a distinction between the two cases: in the case of timber, the soil and the trees are committed to the custody only of the lessee; but in the principal case the soil was sold; and the only damage the lessor could sustain would be by the manner of the excavation, which is totally a distinct damage from those demanded by the lessee.

If timber trees are included in a demise, it must be considered only as an arrangement for the sale of certain individual trees, to be cut by the tenant at seasonable and convenient times during the term; therefore, after the lessee has once felled timber in one particular place, he can never cut timber again in that place; (*k*) but where, as in wood counties, woods are managed as underwood, that is, wood that if allowed to grow might become timber, is by the custom of the country cut at the age of twenty or thirty years old; there, if such wood-land is demised, the tenant may cut during the term at all seasonable times during the lease such wood as by the custom of the country is usually felled. (*l*)

Where (*m*) under a beneficial long lease a liberty was granted to the lessee to cut down and dispose of all timber and coppice (the value of it being included in the consideration) then growing or thereafter to grow, during the term, subject to a proviso that when and so often as the lessee should intend during the term to fell the timber, &c. he should give notice in writing to the lessor; and if the lessor should decline becoming the purchaser, he might cut down the whole at different seasons, it was held that if the lessee *bond fide* intended to cut down the whole, he might give notice in writing to that effect; and on the lessor's disclaiming, he might cut down the whole at different seasons without any fresh notice, and although the lessor might in the interval have parted with the reversion.

In Sheph. T. 85. the following distinction is taken:—If a man have two hundred acres of wood, and he grant it for life or years, and that he shall cut therein four or five acres every year; there,

(*k*) *Andrews v. Glover*. 3 Leon. 7. Godb. 4.

Gower v. Andrews, Moor 15. Anon. 1 Leon. 29. Moor. 94.

(*m*) *Goodtitle d. Luxmore v. Seville*, 16 East. 87.

(*l*) *Brook v. Cobb*, 2 Brownl. 150.

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(*m*) *Goodtitle d. Luxmore v. Sa-*
ville, 16 East. 87.

(*l*) *Brook v. Cobb,* 3 Brownl. 150.

seed, and the other three should find the other moiety, and should manure the land; and that the plaintiff Hare should have one half of the grain when reaped, and the other three the other half. It was held that Hare alone could maintain trespass; for this was no lease of the soil: but, with respect to the corn, the plaintiff Hare and the other three were tenants in common.

By the grant of a forest, park, chase, or warren, in the soil of the grantor, the soil as well as the privilege passes: but not if the soil be another's, because in that case the grantor can transfer only what he himself possesses. (*d*)

A sheepwalk may include the soil by the custom of the country. (*e*) In another report (*f*) of the same case it appears that the demise was of a sheepwalk *cum pertinentiis*. Houghton, J. said that such phrases were known in Norfolk as a name of land: but, even if it should be taken as common, yet the soil would pass by the word *pertinentiis*. It is observable, however, that the action was debt; and the defendant pleaded *nil debet*, which by the verdict was found against him; and therefore the court said that after verdict it should be intended to be a good and available lease.

Henry VIII. granted all his turbarry in D. for years; and the lessee improved part of the land, and left the rest turbarry. Queen Mary granted *totam illam turbariam*: it was held that the improved part did not pass. (*g*)

In a case of parish settlement a lease of a fishery of a pond with the spearsedge, and the flags and rushes growing in and about the same passed the soil. (*h*)

According to Lord Coke (*i*) a several fishery does not necessarily include the ownership of the soil; which, is according to the opinion in Shephard's Touchstone. Lord Coke also considers a common of fishery and a free fishery as the same thing. Blackstone, (*k*) on the contrary, makes the following distinctions, namely, that the ownership of the soil is essential to a several fishery, and that a free fishery differs both from several fishery

(*d*) 2 P. Wms. 399. Sir R. Cromwell's case, Dy. 169. b.

(*h*) Rex v. Old Alresford, 1 T. R.

(*e*) Huddleston v. Woodroffe, 2 Roll. Rep. 61.

(*i*) Co. Litt. 122. a.

(*f*) Cro. Jac. 512.

(*k*) 2 Blackst. Com. 29.

(*g*) Farrington v. Charnock, Owen

and common of fishery : from the former by being confined to a public river, and from the latter by being exclusive. Mr. Hargrave has questioned both these positions. (*l*) With respect to the first, the true doctrine seems to be that the grant of a piscary generally passes the soil, and the presumption is so till the contrary be shewn : but they may be in different persons. (*m*) Both parts also of Blackstone's description of free fishery seem to be disputable. Though, for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers derived from the crown, and though in other countries it may be so considered ; yet, from the language of the books, this kind of fishery seems to have been extended to all streams whether public or private. (*n*)

In a late case (*o*) a question arose, whether any land was connected with the demise of a fishery made in the following manner : a demise of "all those fisheries of the halves and havendoles, with the appurtenances to the said halves due and accustomed within the river Severn, between certain limits within a manor bordering on the said river ; and of all royal fish taken within the said limits, put and wheel fishery excepted." Lord Ellenborough, C. J., in delivering the judgment of the court, said, that he did not perfectly understand the expression "halves and havendoles : " but whatever the meaning might be, he thought the grant of the fisheries with the appurtenances to the halves and havendoles due and accustomed shewed distinctly, that these halves and havendoles were of the nature of some local limit within which the fishery connected with the soil was to be exercised. There were also these further words, "all royal fish there to be taken," upon which an argument had been drawn from Lord Hale's Treat. in Harg. Law Tracts. 44., where it is said to be a great presumption that the shore is parcel of such manors as have royal fish ; otherwise they could not have them : and it was argued that here the grant of one thing leads to a necessary implication of the grant of the other, by which alone the first can be conveniently exercised. Such was the argument ; and it was an argument of powerful inference. In this case a

(*l*) Co. Litt. 122. a. n. 7.(*n*) Co. Litt. 122. a. n. 7.(*m*) North v. Cox, Vaugh. 251. Potter v. North, 1 Saund. 350. Hoskins(*o*) The King v. Ellis, 1 Maule and Selw. 652.

v. Robins, 2 Saund. 324.

rent was reserved : but he relied the less on that, although more applicable in its nature to corporeal than to incorporeal hereditaments ; because there had been some controversy on that point. On the other hand it was contended, that “ put and wheel fishery ” being excepted, no right of soil could be intended to pass, because these could only be enjoyed by stakes and posts affixed to the soil. From this exception, however, Lord Ellenborough said, he had deriv’d an argument of a different kind, namely, that all that was not excepted passed by the grant, and that the reserving a partial interest in the soil shewed that the parties contemplated the whole otherwise passing.

In a recent case, (*p*) the owner of the fee granted to A. his partners, fellow-adventurers, executors, administrators, and assigns, free liberty, licence, power, and authority to dig, work, mine, and search for tin, tin-ore, &c. and all other metals and minerals whatsoever, throughout certain lands ; and the tin, tin-ore, &c. to raise and make merchantable and dispose of to their own use, subject to certain reservations ; and within the limits of the *set* thereby granted, to dig and make such adits, shafts, &c. and to erect such sheds, engines, and other buildings, as they should from time to time think necessary for the more effectual or convenient exercise of the liberties thereby granted ; together with the use of all such water and water courses arising or running within the said limits, as were not in grant to any other person ; excepting the pot-water belonging or running to certain other tenements therein mentioned ; with liberty to divert and turn such water and water-courses except as aforesaid, and to cut any channels for conveying the same over any part of the lands lying within the limits of the *set*, for the purpose of more effectually and beneficially exercising and enjoying the liberties thereby granted, except unto the grantor, his heirs and assigns, and his and their workmen, &c. free liberty of driving any new adit, from any adit driven or thereafter to be driven, within the lands thereby granted ; and of quietly entering into and driving such new adits through the same or any part thereof ; and of sinking any shaft therein necessary and proper for the driving of such adit into any other lands of the said grantor, or into the lands of any other person at his and their pleasure ; and also except unto the said grantor, his heirs and assigns, full liberty

to convey any watercourse over the premises granted, or any part thereof, in such manner as he or they respectively should think meet for any purpose whatsoever, doing no injury to the workings of A., his trustees, &c. to have, hold, use, exercise, and enjoy the said several liberties, licences, &c. for the term of twenty-one years: and then followed the reservations beforementioned, and other usual clauses in the leases of mining concerns. The court were of opinion, that this deed amounted to a mere licence, with a grant of such of the ore only as should be found and got; the grantor parting with no estate or interest in the rest, and that the grantee had no estate or property in the land itself or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; and the expression "the land hereby granted," which occurred in several parts of the deed, having been relied upon, as shewing that the soil was intended to pass. Abbott, C. J. in delivering the opinion of the court said, "These expressions may, probably, be attributed to want of care and caution in the preparation of the deed: but, supposing them not attributable to inadvertency, or supposing that we should not be justified in so attributing them, still they can, in our opinion, have no farther effect than to shew that the grantor, who used them, supposed that the soil or minerals, and not a mere liberty or privilege, passed by his deed; and if the words used in the granting part of the deed were of doubtful import, and would bear the construction for which the lessor of the plaintiff contends, such doubtful words of grant aided by the others, shewing the intent, might be sufficient to pass the land or soil or minerals themselves, and to support an action of ejectment. But whatever doubts these expressions may cast, yet we think they are not sufficient to vary the construction that must be given to the words of the granting part of this deed, as those words are in themselves alone plain and not of doubtful import; and as the proper office of that part of the deed is to denote what the premises or things are that are granted; and as the place where the intent of the grantor, and what he has actually done in that respect, is more particularly to be looked for, recourse must be had to the proper and efficient part of the deed, to see whether he has actually granted what it is urged his expressions denote, that he supposed that he had granted: for the question, properly, is not what he supposed he had done; but what he really has done by his grant. For these

incorrect expressions, the precise import of which he might not accurately attend to, are not sufficient to constitute or to operate so as to extend the grant, by converting the things granted from incorporeal to corporeal, and from chattels personal when gotten into real, previously to their being gotten; which must be the case, if we were to adopt the reasoning on the behalf of the lessor of the plaintiff, as to the effect and operation of the deed, and which would carry the rights of the grantee much farther than the grant of a licence or authority extends." The cases relied on by the court were Lord Mountjoy's case, (q) and Chetham v. Williamson. (r) Lord Eldon in a previous case (s) before him, arising out of the same dispute, said, that the instrument in question was nothing like a demise of mines. The leases, as they were called, were not demises of the mines: but simple grants and licences to work.

In Lord Mountjoy's case (t) a bargain of sale was made by Lord Mountjoy of the manor of C., with a proviso whereby the grantee covenanted with Lord Mountjoy that the said lord might dig for ore, and also dig turf. The judges were of opinion that this was a new grant to dig in the lands in question; and that the grantee and his heirs might dig there too. And it was ruled principally on the ground of this decision, in the modern case of Chetham v. Williamson, (u) that a conveyance by lease and release with a covenant by the lessee, that it should be lawful to one of the lessors to get coal in the land in question, did not give an exclusive right to get coals, as against the owner of the soil.

Honour or castle, if the castle be *caput baroniæ*, may include one or more manors or lordships: but castle commonly signifies only the house and the ground on which it stands.

The word "manor," without any other words, passes inclusively demeanses, rents, services, lands, meadows, pastures, woods, commons, advowsons appendant, courts baron, and their perquisites, if they are parcel of it at the time of the grant. By the grant of a manor, also, several towns or villages may pass: also, an honour may pass by this name, or a castle, which is *caput baroniæ*;

(q) Moor. 174. And. 307. Godb. 17.

(r) 4 East. 469.

(s) Norway v. Roe, 19 Ves. 158.

(t) Lord Huntingdon v. Lord Mountjoy, 4 Leon. 147. Godb. 17.

(u) 4 East. 469.

and one manor which is parcel of another manor may pass included in the grant of that of which it is a parcel. So by the grant of a rectory or parsonage the house, glebe, tithes, and offerings; and by the grant of a vicarage all things belonging to the vicarage will pass. But there are many other things of an incorporeal nature which, although they have been enjoyed from time immemorial with things corporeal, will not pass as parcel or part of them, without being specially named, or unless some such general word as "appurtenances" is used. Such are warrens, courts-leet, waifs, and estrays, which by continual enjoyment do not become parcel of a manor in the way that an advowson appendant does. (x)

By the grant of a grange will pass a house and edifice, not only where corn is stored, but necessary places for husbandry, as stables for horses and other cattle, and sties, and the curtilage or close wherein the whole stands. And where meadow, pasture or arable land, enjoyed with and belonging to such a house, have been known collectively by this name, it is a sufficient description to pass the whole. The word "farm" properly signifies a capital messuage with a considerable quantity of land belonging to it, or usually enjoyed with it.

A messuage, or messuage with the appurtenances, (y) passes only the dwelling-house and other out-houses immediately adjoining, together with the close on which the dwelling-house is built; and the orchard, garden or curtilage (z) to the extent of about an acre or so, lying near and usually enjoyed with the messuage. In the time of Henry the Eighth it was usual to add these words, "and all lands, tenements, and hereditaments, appertaining to the said house, and being occupied and let therewith;" and by these words any larger quantity of land used to pass, and would at the present day with the house: (a) but the orchard, garden, and curtilage have been always held to pass by the grant of a house, without the words "appurtenances;" and, therefore, there appears to be little difference between a house and a messuage. (b) By the grant of a cottage a small dwelling-house to which no land

(x) Dy. 30. b. pl. 209.

(y) *Smithson v. Cage*, Cro. Jac. 526.

(z) *Smith v. Martin*, 2 Saund. 394. 400.

(a) *Bro. Feoffin*, 58; *Bottisworth's case*, 2 Rep. 32. a. *Blackburn v.*

Edgeley, 1 P. Wms. 603. *Gettings v. Lake*, Cro. Car. 168.

(b) 1 Co. Litt. 5. b. 56. a. b. *Doe d. Clements v. Collins*, 2 T. R. 502.

Contra, *Keilw.* 47; *Moor*. 24.

belongs is usually intended: but it will include a curtilage, back-side and a garden. (d) A toft is a place where a messuage formerly stood.

By the demise of a messuage or dwelling-house, together with all the rooms and chambers thereto belonging or appertaining, is to be understood only what has been occupied together as the entire messuage at one time. Where, therefore, a room forming part of the house had been separated for many years by a wooden partition, it was held not to pass by such a demise. (e)

With respect to specific descriptions of buildings which are appropriated to the purposes of trade or manufactures the same remark applies, that has already been made respecting specific descriptions of land; namely, that it is generally implied that its nature shall not be altered by the tenant: therefore, the conversion of a brewhouse into other tenements, although of greater value, has been held waste, because the nature of the thing is altered, and the evidence also. (f) So it is waste to turn a corn-mill into a fulling-mill; and where a mill had been used to be worked by the prisoners in Bridewell, and the lessee converted it into a horse-mill, this conversion was held waste, although to the advantage of the lessor. (g) So it is waste to enlarge a house by additional buildings, as well as to pull it down or diminish its size, (h) or to build a new house on the premises. It is also said to be waste to pull down a house and to rebuild it, although it be too bad to repair. (i)

Whatever constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidentally severed at the time of the grant. Therefore by the grant of a mill a millstone passes, though severed at the time of the grant: so, by the grant of a house, the doors, window-sashes, locks, and keys, pass as parcel of it, although, by accident, they may not be in their proper places when the lease or grant is made.

Parcel or not parcel is always matter of evidence; and the tenant is not estopped by the description in the deed, because the description of the parcels is not of the essence of the deed: there-

(d) Shep. T. 93.

(e) *Kerslake v. White*, 2 Stark. N. P. H. 308.

(f) *Cole v. Green*, 1 Lev. 309, 311.

Cole v. Forth, 1 Mod. 94. Anon. 11

Mod. 7.

(g) *The city of London v. Grayne*, Cro. Jac. 182.

(h) 1 Mod. 95.

(i) *Ibid.*

fore, where (k) in an action of covenant the plaintiff declared that he had demised several parcels of land which were particularly described, some as arable, some as meadow, and some pasture; and the lessee covenanted to pay 5*l.* per acre for every of meadow which he should plow; the defendant was allowed to shew that the land described as meadow in the lease had been plowed for sixty years before, and was not meadow at the time of the lease; and the court observed that the parcels in a deed were often taken from former deeds without regard to the alteration in the description of the land. If, however, the deed describe land as meadow land, it is *prima facie* evidence of its being meadow land at the beginning of the term. (l) This, indeed, is not a point decided in the case cited, but only a marginal abstract by the reporter: but it seems to be a self-evident proposition, that the description of the property appearing on the face of a deed is to be taken as *prima facie* evidence of its truth. But Sir W. D. Evans has noticed, that in a very useful digest of the cases decided during the late reign (m) the case is represented as establishing the doctrine that where a demise is by indenture, the parties are estopped from disputing that the state of the premises were such as described in the lease. Whatever, observes the same learned person, may be the real effect of the doctrine of estoppel in such a case (a doctrine, be it remembered, always founded upon the principle of excluding the actual investigation of the truth,) the position as just stated is certainly not warranted by the case referred to. And he adds, it is of great importance to notice any inaccuracy in such collections as that in which the position is found, as such works constitute the most important part of a circuit library. The doctrine itself is expressly contradicted by the before-mentioned case of Skipwith and Green.

So in another case (n) it was said that the construction of the deed must be according to the subject matter. On this ground, therefore, it was necessary to put a different construction on leases of premises in populous cities from leases of similar premises in the country. Although *prima facie* cellars, for instance, would pass with a house, evidence would be allowed to shew that they were

(k) Skipwith v. Green, 1 Str. 610.

and Tenant.

(l) Birch v. Stephenson, 3 Taunt.
469.

(n) Doe d. Freeland v. Burt, 1 T.
R. 703.

(m) Hammond's Dig. tit. Landlord

not intended to be demised. But parol evidence will not be allowed to shew that a particular estate was left out of a lease made in pursuance of an agreement by the direction of both parties, if no exception has been made in the agreement. (o)

Where (p) a deed purported to be the grant of all the coal-mines in the lands in the occupation of A., and the grantor at the time of the grant had no lands in the occupation of A., the deed having been founded upon a contract some months before, to which the grantor's land steward was the subscribing witness, it was held that letters written by the land steward to the grantees respecting the coal-mines in the deed by the grantor's direction were admissible to explain this latent ambiguity, and that without shewing an express authority from the grantor to write them.

Where a grant is general, the addition of a particular circumstance will operate as a modification of it: but if a particular thing is once sufficiently ascertained, the addition of a mistaken or false allegation will not frustrate the grant. (q) Therefore, if one lease all his meadows in D. containing ten acres, and they contain twenty, all shall pass. (r) So where A. seised in fee of fifteen messuages, in the occupation of fifteen separate persons, demised them to B.; and the grantee of the reversion, reciting the lease to B., demised all those fifteen messuages which A. demised to B. now in the occupation of C., D., E., &c. naming only fourteen of these persons, it was held, notwithstanding, sufficient to pass the whole fifteen messuages. (s)

So where (t) a corporation demised their glebe land in Cherterton, viz. seventy-eight acres of land, all their tithes as improPRIATORS, and also the tithes of the said seventy-eight acres, all which lately were in the occupation of Margaret Peto, and the tithes had never been in the occupation of Margaret Peto; it was, notwithstanding, held that the tithes passed. In this case, indeed, the justices said that the clauses were distinct, viz. first, the seventy-eight acres; secondly, the tithes predial and personal; and then the tithes of the seventy-eight acres: but afterwards they said that this being the case of a common person, the addition of a false thing,

(o) *Lawson v. Laude*, 1 Dick. 346.

East 51.

(p) *Baumont v. Field*, 1 B. and A. 247. See *Doe d. Chichester v. Oxendon*, 4 Dow. P. C. 65.

(r) *Lord Willoughby v. Foster*, Dy. 80. b.

(q) *Doe d. Conolly v. Vernon*, 5

(s) *Trapp's case*, 3 Leon. 235.

(t) *Swift v. Eyres*, Cro. Car. 546.

viz. false possession, should not hurt the grant; for the addition of falsity should never hurt where there was any manner of certainty before; and they referred to *Dodington's case* (u) and *Bozoun's case* (x) but in the king's grants, where there is a falsity in point of prejudice to the king's benefit, or a false suggestion of the party, all shall be void. (y)

So if a deed describe land by its quantities and occupiers, though it describe it as being in a parish in which it is not, yet the land will pass by the deed. (z) The mention, indeed, of a county or parish is quite unnecessary. (a) The legal division of land is into townships, with which "dale" in a *precipe* is said to be synonymous. Parishes were ordained by the council of Lyons. If, however, a parish contain a township of the same name together with many other townships, and lands be granted in that place, naming it without distinguishing whether the parish or township be meant, the grant shall be taken most strongly against the grantor, and shall refer to the parish generally, and not only to the township. (b)

The term "abuttal" has never been construed strictly: thus, if premises be described as abutting on a house to the east, it may be north-east or south-east. So premises may be described as abutting upon a road, although it abut upon grass-land lying between the fence of the close and the road: all that space was road before turnpikes came into use; and in common parlance it is still called the road. On this ground it has been doubted whether the lord of the manor could hinder his grantee of land so described from coming over such grass-land into the road. So where (c) a grant was made of a certain quantity of land of unequal breadth described as abutting upon a road, the broadest part of which abutted upon the road; but between the narrowest part and the road a narrow strip of the grantor's land intervened: it was held that the grantor and those claiming under him could not prevent the grantee from coming over this slip of land into the road.

Where (d) A. had a piece of ground or garden plot, and de-

(u) 2 Rep. 52. b.

(x) 4 Rep. 34.

(y) See *The King v. The Bishop of Rochester*, 2 Mod. 1.; and *Doe d. Davies v. Williams*, 1 H. Bl. 25.

(z) *Lamb v. Reaston*, 5 Taunt. 207.

Norris's case, Dy. 292. b.

(a) *Dry v. Fynn*, Ow. 133.

(b) *Owen* 60.

(c) *Roberts v. Karr*, 1 Taunt. 495.

(d) *Burton v. Brown*, Cro. Jac. 648.

leased it to B., who assigned his interest to C.; and C. having built on part of the ground, and having left sufficient garden, the lessor demised to the plaintiff all the garden plot or ground, late in the tenure of B., and now in the occupation of C.: it was held that all the garden plot, as it was in the tenure of B., passed together with the houses built by C. But where (c) Henry the Eighth leased all houses, and the mills, &c. in Wells, and it appeared that there were two mills under the same roof, one of which was in the town of Wells, and the other not,—the mill within the town only was held to pass.

In the case of *Hunt v. Singleton*, (f) the dean and chapter of Saint Paul's London, being seised of a messuage in London in 4 Edward VI. leased it to A. for forty years, who assigned his lease to B., who afterwards in the twentieth of Elizabeth leased two chambers of the messuage to C. for twelve years; then B., executing the lease to A., surrendered by writing to the dean and chapter: who reciting the surrender leased to B. in these words: they demised "all their said messuage or tenement, with the appurtenances, by the said B. now occupied, and all other rooms with the same occupied, and now in the tenure of B., between the messuage of J. S. East and J. N. West;" and so much in length, for forty years. The jury found that the rooms in question were in the tenure of C., and not of B.; and the nether story was within these boundaries, but not the rooms in question. Afterwards the dean and chapter leased these two rooms to the plaintiff, who entered and was ousted; and in an action of trespass against B., it was adjudged for the plaintiff.

As a corollary from this part of our subject it may be here observed that the tenant is under an obligation to preserve the boundaries of the land demised; and if he permit any part of the demised land to be so intermixed with his own, that they cannot be distinguished nor restored specifically, he must at the end of his lease substitute land of equal value to be ascertained by a commission out of the Court of Chancery. And if there are several co-lessees, each and every of them is under an obligation not to permit an intermixture by his co-lessees; for they form as to the landlord but one lessee. (g)

(c) *Hall v. Combs*, Cro. Eliz. 368.

(f) Cro. Eliz. 473.

(g) *The Attorney General v. Fuller-*

ton, 2 Vcs. and B. 263. *Willis v.*

Parkinson, 1 Swanst. 9

Encroachments, however, of tenants upon the waste do not belong to the landlord; because the tenant cannot make the landlord a trespasser: (h) so also where there is a demise of a piece of ground on which the tenant builds, and the building corresponds with the abutment, though not with the measured distance as stated in the lease, the lessor shall not afterwards be allowed to claim the overplus on the footing of an encroachment; although he see the building going on, and do not object to it. (i) It might make a difference if the tenant acknowledged a holding of the landlord. (k)

Where, (l) a lease for lives inclosed part of the waste adjoining the demised premises, the soil being in the lessor, and occupied the whole for thirty years, Graham, B. directed the jury to presume that the inclosure was taken in with the content of the lessor in right of the demised premises for the benefit of the lessor when the lease should expire.

A commission to ascertain boundaries can only be obtained, where the confusion arises from the misconduct of the defendant, or those under whom he claims, and only where it is shewn that they cannot be ascertained without the assistance of the court. Therefore where (m) a termor had by himself, or his under-tenants, suffered the boundaries between the demised premises and contiguous land of his own to be confused, he could not after the term ended have a commission against the assignee of the lessor who then entered, and ever since continued in possession of both, without any imputation on the propriety of his obtaining possession.

Mines, it may be here observed, are different in many respects from other corporeal hereditaments, as to the interests the lessees take under a lease of them. They have always been considered in a manner a species of trade. In the north of England there are sometimes twenty or more part-owners of the same mine; and in a late case (n) Lord Eldon regarded such a lease as a partner-

(h) Doe d. Colclough v. Milner, 2 Esp. N. P. C. 460. Doe d. Challoner v. Davies, *ibid.*

(i) Neale d. Leroux v. Parkin, 1 Esp. N. P. C. 238.

(k) See Doe d. Colclough v. Milner, 2 Esp. N. P. C. 460.

(l) Bryan d. Child v. Winwood, 1 Taunt. 208.

(m) Miller v. Warrington, 1 Jac. and W. 484. Speer v. Cawter, 2 Meriv. 410.

(n) Jeffreys v. Smith, 1 Jac. and W. 298.

ship concern; although at law strictly they are tenants in common. If it was to be regarded strictly as tenancy in common, it would be impossible to carry on the works; for each might have a set of miners going down the shaft to work his twentieth part. He thought therefore, without reference to the particular circumstances of any case, a contract must be implied to carry on the mining concern in a practicable and feasible way. In the case cited in consequence of disputes amongst the owners of a mine, an application was made to the court for a receiver; and Lord Eldon said he would appoint a receiver, although the parties were tenants in common. The difficulty of knowing what is to be paid for wages and the expenses of management gave the court a jurisdiction as to the mine profits which it would not assume as to other lands. If therefore the parties could not by contract agree to appoint a manager, the court would manage it for them. So, although one tenant in common cannot maintain trespass against another, on this ground and on account of the peculiarity of this species of produce, the court will grant an injunction against trespass, and will allow a party to maintain a suit for profits, which in other cases it would not do. But in the same case (b) Lord Eldon said, "If persons as partners become the purchasers of a lease of mines for forty years, that is not an agreement for a partnership for that term."

In treating of incorporeal hereditaments, it is important to define what the terms, incident, appendant, appurtenant, and similar words, technically signify. Part or parcel of a thing is that which is required to the composition of compound things; as the demesnes and services are part of a manor, glebe and tithes of a rectory, because they are necessary portions of one entire thing, and are not, legally speaking, incident, appendant, or appurtenant. Appendant is a term which must be confined to commons and advowsons appendant, and necessarily implies prescription. The words incident and appurtenant may be generally used with reference to all those hereditaments which may be in any manner annexed to things corporeal, and enjoyed with them where the union most probably has commenced by grant, although it may be by prescription. The thing corporeal however must agree in nature and quality with the thing appurtenant. Therefore, a

court leet, which is temporal, cannot be appurtenant to a church which is spiritual. So a seat in a church, if appurtenant, must be so to a house. Incidents properly signify those things which are not known by the name of appurtenant or appendant, and yet are annexed to corporeal hereditaments; in this way a court baron is incident to a manor, a court of piepoudre to a fair, rent and fealty to the reversion.

Land cannot be appurtenant to a messuage in the proper sense of the word; nor can one species of land be appurtenant to another species of land, because the term is only properly applied to the annexation of incorporeal to corporeal hereditaments in those cases in which the law permits such an union. But land may be appurtenant to a messuage in common parlance, as being usually occupied with it. (p)

Common appendant is peculiar to arable land for beasts that serve for the maintenance of the plough, as horses and oxen; and to dung and compester the land, as kine and sheep. Such beasts are therefore called commonable beasts. Beasts which are not commonable are swine and goats. A grant of common generally does not extend to beasts which are not commonable; but it is otherwise, if the grant be for all manner of beasts. A grant of common *sans nombre* does not exclude the grantor from commoning with the grantee. (q) Common appurtenant to land for cattle levant and couchant upon the land, whether by grant or prescription, may be apportioned by the grant of part of the land to which it is appurtenant. (r) Where, therefore, A. seized of two virgates of land, with common appurtenant, made a lease for years of part, with the common belonging to it, it was held that it might be apportioned; and in this respect there is no distinction between common appurtenant, and that which is appendant. (s) But if a commoner purchase part of the land on which he has common appendant, the common will be apportioned: on the other hand if it is common appurtenant, the whole is suspended during the lease, (t) because against common right.

A foldcourse, *i. e.* common of pasture for a certain number of

(p) *Doddridge on Advowsons*, 88.
Hill v. Grange, Plow. 170. *Wilmote v. Carn*, Cro. Eliz. 918. *Anon. Moor*. 231.
 Cro. Eliz. 16.

(q) *Co. Litt.* 122. a, n. 5.

(r) *Sacheverell v. Porter*, Cro. Car. 482. *Anon. Hob.* 235. 3 Rep. 78. b.
Co. Litt. 122. a.

(s) *Mors v. Webb*, 2 Brownl. 237.

(t) 3 Rep. 79. a.

sheep in a certain field may be appurtenant to a manor : and if the lord grants or leases to another a certain number of acres, parcel of the manor with the said foldecourse, this will pass with the said acres, and shall be appurtenant to them ; (t) for it being in the nature of a common certain, it may well be divided from the manor, and annexed to a parcel of it, and there can be no prejudice to the terretenants.

Where (u) it appeared that A. having a certain quantity of land in a common field, and also having a right of common over the whole field, and B. also having a right of common over the whole field, entered into an agreement to forbear exercising their respective rights for a term of years ; and each covenanted to that effect : this in effect was a mutual lease ; and therefore, although one commoner cannot distrain the beasts of another commoner *damage feasant*, yet this agreement controuled the general law, and therefore A. might distrain the cattle of B. coming on his land during the term.

In general the grant of an advowson appendant by the act of the party severs it from the manor for ever : but if the grant be of the manor and the advowson, or of a house and a shop *nomi- natim*, this is no estoppel to say that the advowson is appendant, or the shop parcel of the house. (x)

Tithes cannot be called hereditaments belonging to land ; because they are of separate tenure : (y) but if land or any corporeal hereditaments be let with all tithes belonging to them, the tithes usually demised therewith will pass. Where, however, a barn in which tithes of certain lands had been used to be inned was demised by such words, such tithes did not pass, but only the tithes usually demised with the barn. (z). If a grant be made of all tithes arising out of or in respect of farms, lands, &c. the tithes arising out of or in respect of common appurtenant will pass. (a) If a lease of tithes be granted after severance, the right in the tithes severed is in the lessor, although not removed from the land. (b)

If a parson lease his glebe, he is notwithstanding entitled to

(t) *Spooner v. Day*, Cro. Car. 432. 363. *Dowse v. Reeve*, 2 B. and P. 578. W. Jon. 375. 3 Vin. Abr. 1. pl. 4. (u) 4 Leon. 183. pl. 382.

(u) *Whiteman v. King*, 2 H. Bl. 4.

(x) *Bro. Estoppel*, pl. 47. *Bro. De-*

mand, pl. 2.

(y) *Phillips v. Jones*, 2 B. and P.

(a) *Lord Gwydir v. Foakes*, 7 T. R.

641.

(b) *Wyburd v. Tuck*, 1 B. and P.

459.

tithes in respect of it; and the same law is of a lay impropiator. So also it is said, that if a farmer take a lease of tithes of his own land by deed, and demises the land, he is entitled to tithes from his lessee. (c) So also it has been held, that since tithes are collateral, and not issuing out of the land, they cannot be discharged, but by special words. Therefore where a person leased his glebe with all profits and commodities, rendering 13s. 4d. for all exactions and demands, this could not pass tithes: but such special words as "for all tithes growing and arising upon the land, as for other demands," might have been a good discharge. (d)

Hereditament is a word of the largest extent in all deeds and grants: for whatever may be inherited corporeal or incorporeal, real, personal, or mixed, is an hereditament. Tenement is also a word of large extent, and seems to comprehend as much as the former. An advowson is a tenement; and so also are tithes, and many other incorporeal things. (e)

A tenement with reference to the law of settlement, we have seen, is a word of extensive signification, in order to confer a settlement under the stat. 13 & 14 Ch. II. c. 12. Any thing in this sense is a tenement, which is a profit out of land. A beastgate therefore is a tenement; and consequently the position in *Rex v. Lockerly, Burr. Settlmt. Cas. 315.*, that the tenement must be in tenure, seems to be erroneous. The pasturage of cows is a tenement: (f) but no settlement will be gained by renting a dairy, including cows and their pasture at a rent above 10l. a year, unless the lands on which they are depastured are above the value of 10l. a year. (g) Renting a common in gross is a tenement. (h) So is a rabbit warren, although the party renting have no interest in the soil, except for the purpose of entering and killing rabbits: for it is a pernanancy of the profits of land by the mouths of the rabbits. (i) A windmill is a tenement within the act. (k) Cattelgate is essen-

(c) *Booth v. Franklin*, *Hetl.* 31.

(d) *Parkins v. Hinde*, *Cro. Eliz.* 161.
Hinde's case, 11 *Rep.* 13. b. *Stiles v.*
Miller, 1 *Leon.* 300. *contra.*

(e) *Dy.* 322. a. pl. 30.

(f) *R. v. Tolpuddle*, 4 *T. R.* 671.
R. v. Piddletrenthide, 3 *T. R.* 772. *R.*
v. Stoke upon Trent, 10 *East*, 406.

(g) *R. v. Minworth*, 2 *East.* 298.

(h) *R. v. Hollington*, 3 *East.* 113.
See R. v. Minchinhampton, 2 *Str.* 874.
R. v. Dusingham, 7 *T. R.* 671.

(i) *R. v. Piddletrenthide*, 3 *T. R.*
772. *See R. v. Kinver*, 1 *Str.* 678.

(k) *R. v. Butney. Cas. temp. Hard.*
391.

tially different from a right of common : for the owner has it not in respect of any custom, but as having a joint interest in the soil, which a right of common is not ; therefore, a cattlegate, is clearly a tenement. (l) A fishery is a tenement. So where (m) a pauper rented by parol " the fishery of a pond with the spear-sedge, flags, and rushes, grown in and about the same for 10*l.* a year," the soil passed; and consequently it was a tenement within the st. 9 and 10 W. III. c. 11. The fact of the pauper's taking the tenement is sufficient, though the lessor has no title. Taking the hay, grass, and aftermath of a meadow for ten months, at the annual value of 10*l.*, is a tenement. (n) So taking land for a particular purpose, as setting potatoes, is a tenement. (o) Feeding generally is no tenement : but where there was an agreement to feed a cow for a season, it was presumed to be fed on land, and not on hay. (p)

The mortgagee of several houses, after recovering possession in ejectment, suffered the mortgagor to inhabit one of them for an express purpose, this was held not to confer a settlement : (q) but in general, in order to acquire a settlement by taking a tenement of 10*l.* a year, no express contract is necessary. It is sufficient if the tenant reside the requisite time on a tenement of such value, with the permission and consent of the landlord, because in such cases the law implies a contract. (r) So although a tenant be removable under certain circumstances, there is no power to dissolve the contract as between landlord and tenant. Therefore, if a tenant be removed, by the order of two justices, from a tenement above 10*l.* a year, and afterwards return to the same tenement, and reside the proper time without making any new contract, he will gain a settlement. (s) A tenant who takes a new lease of a tenement under the value of 10*l.* is always liable to be removed under the stat. 13 & 14 Ch. II. c. 12.

The renting by a needlemaker of certain runners in another's mill, together with a packeting room, of all which he had exclusive use, (the runner being a piece of machinery for scouring

(l) *R. v. Whitley*, 1 T. R. 127.

474.

(m) *R. v. Old Alresford*, 1 T. R.

(p) *R. v. Darby*, 14 East. 390.

358.

(q) *R. v. Catherington*, 3 T. R.

(n) *R. v. Stokes*, 2 T. R. 251. *See*

771.

v. Brampton, 4 T. R. 318.

(r) *R. v. Netherscal*, 4 T. R. 258.

(o) *R. v. Shenston*, Burr. Sett. Ca.

(s) *R. v. Filmongley*, 2 T. R. 108.

needles screwed down to the floor of the mill) the whole being above the annual value of 10*l.* including the runners, is not a tenement to confer a settlement: it is only a licence to use part of the machinery. (*l*) So a contract for a standing place in another's mill for a carding machine, (the pauper's own property) which was fastened to the floor and the ceiling, for the purpose of being worked by the steam-engine of the mill, for which the party was to pay 20*l.* a year, with liberty to quit at three months' notice, is a mere licence and no tenement. (*u*) So where (*x*) there were articles of agreement under seal by certain persons with the owner of a corn-mill, to deliver with their own horses and carts a certain quantity of corn every week, from 25th September, 1790, to 25th March, 1795, to be made into flour at 8*s.* per load; and the owner of the mill covenanted with the termors that they should have the running and grazing for their horses in a certain meadow, and also the use of a stable and carthouse gratis: and he also covenanted that at the end of the term he would take all the articles and utensils at a fair appraisement. It was held that there was no colour for construing this to be a tenement.

In former times many distinctions arose on the meaning of the word "reversion." It may mean the estate which shall revert in possession after another estate in possession: (*y*) but it usually means the estate which remains in the landlord after he has granted a particular estate in possession. In this sense a reversion may be parcel of a thing in possession: but a thing in possession can never be parcel of the reversion. Therefore if a man seised of a manor lease part of the demesnes, the reversion remains parcel of the manor, and will pass with the grant of the manor. (*z*) But if a man lease the manor for life, excepting twenty acres, and then grants the reversion, the twenty acres will not pass with it. (*a*) Where, however, (*b*) the lessor leased a manor excepting trees, and then made a second lease of the trees, and then leased the manor a second time without any exception, this was held to pass the trees.

(*l*) *R. v. Tardebrigg*, 1 East. 528.

145. *Milburne v. Doshburne*, Cro.

(*u*) *R. v. Mellor*, 2 East. 189. *R. v.*

Eliz. 323.

Dodderhill, 8 T. R. 449.

(*z*) *Bawell v. Lucas*, 2 Leon. 221.

(*x*) *R. v. Hammersmith*, 8 T. R. 450. n.

(*a*) *The Bishop of Gloucester v. Wood*, Winch. 46, 57.

(*y*) *Wrotesley v. Adams*, Plow. 167. *Throgmorton v. Tracey*, Plow.

(*b*) *Ive v. Sams*, Cro. Eliz. 521.

In the lease of a ready furnished house it is usual to annex a schedule or inventory of the furniture to the deed; which will have the same operation as if inserted in the deed itself, according to the rule *verba relata hoc maxime operantur per referentiam ut in eis inesse videntur*. The possession of the furniture in such cases is so completely transferred to the lessee, that it is not attachable by the sheriff on an execution against the lessor; (c) nor can the lessor maintain either an action of trespass (d) or trover (e) against the sheriff for taking the furniture under a writ of *fiery facias* against the lessee, although after notice that it is a ready-furnished house. But it has been determined that a tradesman supplying a married woman, living apart from her husband, with furniture on hire, may maintain trover against the sheriff for taking such goods in execution at the suit of the husband's creditors, inasmuch as the married woman was incapable of acquiring a property in them. Another point made in the case was, that the goods being let for an indeterminate time, if the contract had been valid, notice to the sheriff's officer could not determine the contract. (f)

With respect to livestock demised with a farm, and the furniture in a ready furnished house, since they are mere chattels, and form no essential part of the premises demised, no waste lies for wantonly destroying them. But deer in a park, and fish, such as carp and pike and their fry, in a fishpond, being considered parcel of the inheritance, the destroying them is waste; and the same may be said of doves and pigeons in dovecotes. (g) The destruction of conies in a warren has been held not waste, because they are *feræ naturæ*, although the warren was paled and inclosed: but a remedy in such a case would at all events be afforded in equity, if the warren is a source of profit, and expressly demised by that name. (h)

The contract for letting goods and chattels is sometimes called letting and hiring, (i) the *locatio et conductio rei* of the civil law. Of goods thus let and hired the rule seems to be, that the hirer must take the same care of them as all prudent people in the world

(c) *Garstin v. Ashlin*, 1 Madd. Ch. Ca. 150. But see 8 East. 476.

(d) *Ward v. Macaulay*, 4 T. R. 489.

(e) *Gordon v. Harper*, 7 T. R. 9.

(f) *Smith v. Plomer*, 15 East. 607.

(g) *Owen* 36. *Smith v. Sacheverell*, Hott. 49. 105.

(h) 4 Leon. 240. *Moyle v. Moyle*,

Ow. 66.

(i) *Puff. de Off. lib. 1. c. 15. s. 10.*

shew to the preservation of their own property; and such a degree of care shall exempt him from answering for loss. (k) According to Bracton, "*talīs desideratur custodia qualem diligentissimus paterfamilias suis rebus adhibet quam si præstiterit et rem aliquo casu amiserit ad eam rem restituendam non tenebitur.*" In this doctrine Bracton is followed by Lord Holt, in the case of *Coggs v. Bernard*; (l) although without any acknowledgment of the source from which it came: where that great judge laid it down, "that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses" in the preservation of his own property. It is observed, however, by Sir W. Jones, in his admirable Treatise on Bailments, that the passage cited from Bracton is copied from Justinian's Institutes, (m) which were according to the *proeme* extracted principally from the commentaries of an ancient lawyer, named Gaius, who was addicted to the use of superlatives; and the epithet "*diligentissimus*" was in fact used by Gaius, and by him alone, on the subject of hiring. It is singular also that Theophilus, in translating this phrase of Gaius, has exaggerated the care necessary upon such occasions still further: he makes use of the expression *ἡ σφοδρὰ σπουδὴ μελεσάτος*. (n) Sir W. Jones concludes, therefore, that there is no authority against the rule that requires of a hirer only the same degree of diligence that all prudent men, that is, the generality of mankind, use in keeping their own goods. (o)

It has been decided that if a lodger steal the goods let with his lodgings, it is not felony at common law, by reason of his special property in them: but this exemption does not seem to extend to the case of a person taking lodgings *animo furandi*, with the intent to rifle them, and elude the law. The statute 3 W. & M. c. 9. s. 5. embraces all offences of this kind, and makes them larceny and felony. But, notwithstanding this is a declaratory, as well as an enacting law, yet it has been held that the declaratory part must be construed with reference to the preamble. It has been ruled, therefore, that a ready-furnished house, the whole of which is let, and no part of it reserved to the lessor, is the mansion-house, and not the lodging of the lessee, within

(k) Bract. fo. 62.

(n) Theophil. Inst. lib. iii. tit. 24. s.

(l) 2 Lord Raym. 909, 920. 1 Salk.

De Locatione et Conductione.

26. Com. 133.

(o) See Essay on Bailments by Sir

(m) Inst. iii. 25. §.

W. Jones, edited by Balmaine, 55—56.

the meaning of the statute. (p) So in a subsequent case, where the prisoner was indicted for stealing some silver spoons in a lodging-house, an objection was taken by his counsel that the case was not within the statute on the following evidence. The prosecutor let to the prisoner a ready-furnished house at Brighton for a month; and gave him an inventory of the furniture, (amongst which were the spoons in question) under an express contract that if any of the goods therein specified should be injured or missing at the end of the time, he, the prisoner, should make them good. The keys of the house were accordingly delivered to him; and he took possession of it, lived in it, and hired and employed his own servants. On reference of the point to the twelve judges all of them, except Grose, J. who was absent, agreed that the case was not within the act. Eyre, C. J. said, it was meant to apply to cases where the owner had a possession and the lodger the use; and was made to obviate a doubt as to the owner's possession. Some of the judges also thought that the agreement to make good what should be missing took this case out of the statute. (q)

Where any thing is granted, all things necessary to its enjoyment pass inclusively. Therefore, if land be granted in the midst of other land of the grantor, a way necessarily passes with the land demised: but if a way does exist, although not so convenient as a way over other land of the grantor contiguous to the land granted, such more convenient way will not pass. (r) In general, however, easements which in effect include almost all incorporeal rights in another's land, which may be annexed to things corporeal, pass by the force of the word "appurtenances." A conduit pipe may thus pass as appurtenant to a house, and the lessee may come on another's land to mend it without any grant or prescription: (s) but then such an easement must have been created by some person having a permanent interest in the land; therefore, if a lessee for years, or for life, during his lease conveys water by such a pipe to his house, and during the lease the lessor sells a part of the land, so that the land becomes severed from the

(p) 6 Evans. Coll. Stats. Pt. V. cl. 7. No. 17. p. 472. n. 14.

(q) Palmer's case, 2 Russell on Crimes, 1297.

(r) Clarke v. Cogge, Cro. Jac. 170,

Jordan v. Atwood, Owen, 122. Staple v. Heydon, 6 Mod. 3. Howten v. Frearson, 8 T. R. 56. 2 Roll. Abr. 60. pl. 17.

(s) Brown v. Nichols, Moor. 682.

house, this easement will not after the lease pass to another grantee by the word "appurtenances." So if a disseisor make such an easement, and the disseisee after entry, without taking conveyance of the easement, sell the land to one, and lets the house to another, the owner of the land is not compellable to suffer the other to enjoy the easement. (t) So if tenant for life, or years, give a licence to another to enjoy an easement on his land for above twenty years without interruption, this will not affect the remainderman or reversioner: he may dispute the easement; and the length of possession will not be presumptive evidence of a grant, unless it can be shewn that he acquiesced. (u) Again an easement may be extinguished by unity of possession; and after it is extinguished, a new easement is not necessarily created by the grant of the messuage or other hereditament by the word "appurtenances," although those who have occupied have always taken advantage of the easement. (v)

It seems, however, that easements will pass by general words, (not by the words "tenements and hereditaments,") (x) in the manner of new grants, although they have been extinguished by unity of possession. In *Bradshaw v. Eyre* (y) the owner of land, subject to a prescriptive right of common, purchased the premises to which such right was attached; and afterwards demised the land with all commons, profits, and commodities, &c. thereto appertaining, or used and occupied therewith. And the court held that these words were a good grant of a new common for the time: for, although it were not common in the hands of the feoffor, yet it is *quasi* common used therewith; and although it be not the same common it was before, yet it was a like common; but because there was not a sufficient averment that this common was used by the lessor at the time of the lease, it passed not. (z) This latter point, observes Sir W. D. Evans, shews the necessity of the common phrases "now or at any time heretofore held, used, and enjoyed, &c." So upon a justification under a grant of a messuage, and all commons appurtenant, judgment was

(t) *Nicholas v. Chamberlain*, Cro. Jac. 121. 205. See post, pp. 327, 330.

(x) *Brook. Read. Stat. of Lim.* 42.

(u) *Bradbury v. Grinsell*, 3 Saund. 175; d. in note. 1 Phill. Ev. 167.

(y) *Cro. Eliz.* 570.

Daniel v. North, 11 East. 372. S. P.

(z) See *Worldg v. Kingswel*, Cro. Eliz. 794.

(v) *Clements v. Lambert*, 1 Taunt.

given against the defendant, because there appeared to have been a unity of possession whereby the common was extinct: but it was said by the court that all commons usually occupied with the message would have passed such a common as there formerly was. (a)

So the case is the same, where the tenants of a particular estate have commonly enjoyed a way or common in the lands of the landlord, without reference to the circumstance that the property in respect of which the enjoyment is exercised, (as in the ordinary case, where the same person is lord of the manor, and of several farms within such manor,) and that which is affected by it, were originally separate or united. (b)

On the same principle, where (c) there was a grant of a manor with all lands, rents, reversions, services, and hereditaments, which were parcel, or had been deemed, reputed, or taken as part, parcel, or member of the manor; and it was urged that a rentcharge, created within time of memory, upon the sale of land part of the manor, did not come within the description, as the reputation ought to go beyond the time of memory: it was ruled that reputation at the time of the grant was sufficient.

It is apparently immaterial whether two properties originally belonging to distinct owners, in the one of which the occupier had the benefit of an easement attaching upon the other, should have become subsequently united; or whether, during the possession by the same person of premises afterwards divided, certain acts should in the first instance be done affecting the enjoyment of part of such premises, in respect of matters which ought to have continuance after their severance. (d)

In 11 Hen. VII. 25. pl. 6. an action on the case was brought upon the custom of London, that where there are two adjoining tenements, and one has a gutter running upon the other, the owner of the latter can not stop it, although in his own land; and the right of action being disputed in consequence of there having been a unity of possession: it was held that the action was such as could not be defeated by unity of possession. So in *Sury v. Pigot* (e) it was held that an action for the diversion of a

(a) *Saundays v. Oliff*, Moor. 467.

(d) MS. observation by Sir W. D.

(b) MS. observation by Sir W. D. Evans.

Evans.

(e) *Poph.* 170.

(c) *Foreman v. Bobham*, Moor. 190.

water-course, which had, time out of mind, run to a certain watering place of the plaintiff, through the lands of the defendant, was maintainable; notwithstanding the defendant pleaded that both the lands had been in the possession of King Hen. VIII. and which unity, it was insisted, amounted to an extinguishment.

The doctrine of revivor in the case of ways deserves a fuller consideration. In *Whalley v. Thompson*, (d) the owner of two contiguous closes having used a road over the one to the other, devised the latter with its appurtenances; and in a plea of trespass it was alleged, that he had used the way as an easement and appurtenance to the premises devised; and the benefit of such way was claimed as passing by the devise. It was ruled that the plea could not be supported. With reference to what had passed in argument, when it had been observed that if the road in question had been described in the devise, it would have passed; and that observation had been followed up by a question, whether the word "appurtenances" would not carry any easement or right that would pass by a particular description? Eyre, C. J. said that its operation must be confined to an old existing right, and that if the right of way had passed in this instance it would have passed as a new easement. Had the devise been *with the way now used*, it would certainly have been a devise of the close in question, with the easement newly created.

To this case (e) is subjoined a note of a passage in Brook's Abridgment, tit. Exting. 15. as follows: A way to a mill having been extinguished by unity of possession in J. S., he died; whereupon partition was made between his daughters; the mill and way were assigned to one, and the land to the other. Held that the way was revived: *tamen videtur* it is a new way. Perhaps, says Sir W. D. Evans, this case, if the circumstances of it were distinctly known, might be resolvable into the doctrine about to be adverted to. There are several allusions in the books in treating of the different kinds of ways to a *way of necessity*; and, from the manner in which the expression is used, it might be inferred that a person holding a given piece of land might *de jure*, and independently of any right arising from grant or prescription, claim a liberty of passing through the land of an adjoining proprietor to the public highway: but this notion is now completely exploded, and the true doctrine appears to be, that where a person

(d) 1 B. and P. 371.

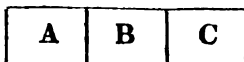
(e) *Whalley v. Thompson*.

has two closes, one of which is near the highway, and the other more remote; and he is surrounded by the lands of other proprietors so that there is no other access, and the more remote portion is sold or otherwise alienated, a right of road through the nearer shall be held to be included without any express disposition for the purpose, and *vice versa*, if the nearer is disposed of, the same right is excepted without express reservation. (e)

It has been determined that when a person conveys land of which he is seised merely as trustee, and to which there is no access except through some adjoining land of which he is seised in his own right, the person taking such conveyance is entitled to the benefit of a way through it in the same manner as if the trustee had been seised of the land conveyed in his own right. (f)

*It is said in 2 Roll. Abr. 60. pl. 17. that the feoffor of land, to which there is no access but through his own land adjoining, shall assign the way where he may best spare it. The same principle, it seems, would apply to the person through whose land the way is reserved by implication.

The following case (g) in the Common Pleas offers some illustration of the doctrine of the reservation of necessary ways. Three closes belonging to different persons lay in succession according to the diagram annexed:—



bounded by public highways at the opposite extremes of A and C., the occupiers of B. having no road except through A. The several closes afterwards became the property of one person; and B. and C. being in the occupation of the same tenant, a communication was made between the two by which access could be had from B. to the road at the extremity of C. The proprietor sold A. to the plaintiff, and afterwards sold B. and C. to the defendant, who was ruled to be entitled to the benefit of the ancient road through A. It was argued for the plaintiff, with respect to the general doctrine of *ways of necessity*, that if the sale be made to the owner of an adjoining close, inasmuch as he has another mode of access to the land which he purchases, namely, from his

(e) Dutton v. Taylor, Lutw. 1487.
Clarke v. Cogge, Cro. Jac. 170. Bul-
land v. Harrison, 4 M and S. 387.

(f) Howton v. Freeman, 8 T. R. 50.
(g) Buckley v. Coles, 5 Taunt. 311.

own close, no way of necessity results from that conveyance; and in such case, inasmuch as that which a man grants must be parcel of his own estate, and since the vendor had alienated A. without any reservation before he sold B., and had the means to satisfy out of his own adjacent close C. this resulting way of necessity, the way over A. did not again revive by reason of his subsequent sale of B. The case had been left generally to the jury at the trial, and appears to have been decided by some of the court upon the ground of the jury having negatived the right of way in the defendant over C.: but the opinions of the judges are very briefly given, Sir W. D. Evans conceives that the court did not by any means fairly meet the argument for the plaintiff as already stated. They held that there was no fact which ought to have been left to the jury. That it was a question of law which ought to have been disposed of by the judge who presided in favour of the plaintiff, who was right in his allegations that no such way of necessity existed. (h) The argument was by one of the learned judges put upon the supposition that B. and C. might have been sold to different persons: but the argument of the plaintiff was, that after the first sale the right of the vendor was extinct in respect of the ancient way, it not being necessary to enable him to have access to the middle close. And if such right was extinct to the seller, it is difficult to conceive how it could be revived in favour of a purchaser who, by the general principles of law, would have a right through the adjoining land of the seller remaining unsold. By another learned judge the jury were considered as negating the proposition that the defendant had a way by C., which was his own close. So far as the case proceeds upon the finding of the jury, observes Sir W. D. Evans, it cannot be a just foundation for any doctrine upon the question of law, which would have been fairly raised if the plaintiff, instead of generally traversing the right asserted, had replied by stating the fact of the seller having after the first sale another approach to the middle close.

The principle of the following case (i) seems to be less obvious than those which have been before cited. The action was brought for the breach of the covenant for quiet enjoyment, in the lease of an inn in Smithfield, which was granted with a particular right of

(h) The way of necessity claimed by the defendant was formally pleaded with all proper allegations, to which there was a replication negating the

fact that the vendor had after the sale such a way as was alleged.

(i) *Morris v. Edginton*, 3 Taunt. 24.

way through a gateway and yard (afterwards reserved by the lessor) to a cellar, part of the demised premises; and all other ways and easements to the demised premises belonging and appertaining. The taproom was on the eastern side of the gateway; and the most obvious and usual approach to it, and that which was used by the defendant during his own occupation, was by the gateway from the street. There was an entrance from the street to a coffeehouse on the western side of the gateway by which access might be had to the taproom across the gateway, but which was less advantageous to the plaintiff. Before the lease the gates of the gateway had usually not been shut till a late hour at night; and the obstruction complained of consisted in shutting them at an earlier hour for the purpose of securing the goods in the carriers' warehouses in the yard beyond. Judgment was given in favour of the plaintiff. The opinion of Mansfield, C. J., so far as it is material to be stated, is as follows:—"The case certainly has admitted of some curious argument, and very well bottomed in the case of *Clements and Lambert*:(j) and no doubt a right of way like a right of common must be claimed as appurtenant; and if either hath been extinguished by unity of possession, it will no longer pass by the name of appurtenant. But there is a wide difference between a lease or grant with easements over other foreign land, and a grant where the easements are in the lessor's own land. All deeds are to be taken most strongly against the maker; and all deeds and writings are to be taken *secundum subjectam materiam*. Now what is the case here? There is no way that we hear of at all belonging to these premises except the way over the land in question. Now as we hear of no other way, and it is impossible that these parties who are supposed necessarily to understand the law(k) could suppose these ways were ways appurtenant. They therefore meant them, being the only subsisting ways, by the improper name of ways appurtenant. I say nothing of a way of necessity. I know not how it has been expounded: but it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for any one to go to the taproom through the gateway than through the coffeehouse; and it is much

(j) *Supra*. p. 325.*Hayes v. Bickerstaff*, Vaugh. 126.

(k) But vide per Vaughan, C. J. in

more convenient to carry out beer through the gateway than through the cofferoom. Can it then be doubted that the intent was to give the same use of the way over the gateway as the lessor before used to have? It is said, if this was a necessary way, it could not pass by this deed. That I do not at all understand: if there be any right of way at all it must pass under this lease under which the plaintiff holds the premises. The argument founded on the expression of the special right of way goes too far; for it deprives him of all ways to the taproom. This does not at all break in upon the authority of *Clements and Lambert*,⁽¹⁾ and the other cases on which it is held that easements are extinguished by unity of possession." The Chief Justice also observed that the provision for a particular right of way had no connection with the way in dispute. Mr. J. Lawrence, and the other judges who spoke, confirmed his observation as to that part of the case; upon which nothing arises of sufficient importance to require that it should be at present adverted to.

Upon this opinion of Sir J. Mansfield the following notes of Sir W. D. Evans occur. With respect to the first observation of the judgment, he remarks that it is difficult to discover the bearing it has upon the question. In both the principal case and *Clements v. Lambert* ^(m) the question related to a right to be enjoyed in the land of the grantor, although in the latter case it was, previously to the union of the property, a right which had been exercised in the land of another. But any general distinction upon these subjects must be in favour of the doctrine that an easement or appurtenance in the land of another will pass as attached to the estate; whereas in many cases an express grant may be requisite to create such a right not before legally existing as affecting the property of the grantor.

The next remark is more general in its nature, and is entitled to peculiar attention as conveying the opinion of a person of so much research and experience. It relates to the two maxims mentioned by Sir J. Mansfield. The principle, observes Sir W. D. Evans, that all deeds should be construed *secundum subjectam materiam*, is in itself manifestly just and equitable, and of the greatest importance in arriving at a proper interpretation according to the true intention of the parties. The maxim that all deeds are to be construed most strongly against the maker is a mere

(1) *Supra*, p. 325.

(m) *Supra*.

arbitrary rule of law, which militates against the intention, at least as often as it supports it, and most probably originated in a perversion of the rule of the civil law; (k) the object of which was to confine the obligation to the smallest limits, consistent with the nature of the subject and the apparent intention of the parties; inasmuch as according to the formal contract by way of stipulation the person, in whose favour the obligation was to be contracted, stated the particulars of such obligation by way of interrogations, to which the other gave an answer expressive of his consent. (l) This maxim, however, in the English law is brought forward with great solemnity, as an infallible guide to the just decision of a disputed question of construction. It has, at least, observes my learned authority, the advantage of saving the trouble of thinking and investigation; and is attended with nearly the same convenience that would arise from determining legal questions by the throw of the die. It seems, however, to be generally forgotten, that Lord Bacon (whose opinion, I am aware, of the wisdom of the rule is a more favourable one than that which I have ventured to adopt) in expounding this rule states, that it is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail; and "if any other come in place, this," says he, "giveth place." If the case at present under consideration had been to be decided by the rule in question, upon the supposition that the facts had been reversed; and that instead of making the lease of the house, reserving the yard and gateway, the lease had been of the yard and gateway, reserving the house; upon the general principle of *verba accipiuntur contra proferentem*, the owner would have relinquished his right of access under the circumstances in question.

With respect to the argument that from there appearing to be no ways strictly appurtenant the parties must have meant the

(k) Sir W. D. Evans does not specify more particularly the rule he alludes to; but probably it is the same as that in the 45th Book of the Dig. under tit. 1. s. 38. viz. *In stipulationibus cum quaeritur quid actum sit verba contra stipulatorem interpretanda sunt.*

(l) And it should be added, that in the case put, to prevent evasion, (a

stipulation being by parol) ambiguous expressions were interpreted against the stipulator, because it was supposed to be his own fault that he did not express himself more clearly. See a most useful auxiliary to the Study of the Civil Law, *Julii Pacii Isagog.*, page 374.

way in question, though improperly called appurtenant, Sir W. D. Evans remarks that this argument assumes that the words of the lease were intended to apply to the particular road which was the subject in dispute; whereas the use of the words easements and appurtenances, and the other general words at present under examination, are not inserted with reference to or as descriptive of any known particular rights attached to the premises; but for the purpose of comprising all such rights or other particulars included in the enumeration as may be in fact existing, and by no means raises an implication as to the actual existence of any such rights.

After making a query whether it would not have been better to have relied upon the general intent to give the same use of the way through the gateway as the lessor had, Sir W. D. Evans concludes his comments on this case in the following words: "In the above judgment several points are alluded to, while it does not distinctly appear upon what ground the case was principally intended to be decided; and it is always to be regretted where a reported case contains several scraps of law, without distinctly disclosing the precise ground of decision; for observations, which are perhaps intended to be only incidental and illustrative, come to be cited in subsequent cases as doctrines which have received the complete sanction of judicial authority. I have therefore thought it not irrelevant in the notes which I have subjoined to make some remarks which, so far as they may be deemed material, may tend to prevent the observations to which they are applied from having a greater influence than fairly belongs to them. Of the intention that the lessee should have the benefit of using the gateway in the manner contended for, it must have been impossible from the situation of the premises to entertain a doubt: but I think it would have been much better to have rested the case upon that broad ground, which would have been equally applicable, if the lease had been by parol or in writing, without inserting the words 'ways and easements,' than to have placed it upon the footing of a special privilege, deriving its effect from the insertion of these words. And according to that view the case would have been fairly reconcilable to the whole doctrine of necessary ways which can not reasonably be considered as confined to cases in which there is no possibility of any other

access: but ought to have a reasonable application, as including all cases where there is not a proper and ordinary mode of access according to the nature of the premises, and the common mode of enjoying them."

Before quitting this part of the subject, it may not be irrelevant to notice the nature of seats in a church: which are sometimes treated as property in gross, and sometimes as merely appurtenant to certain tenements, and as such severable. The law upon that subject seems to be clearly, that the body of the church belongs to the parishioners at large: but that the ordinary has a power to assign certain seats to the occupiers of certain messuages, and that a seat may be claimed as so attached by prescription. But it is impossible for the proprietor of the messuage so to sever the seat as to attach it of his own authority to another messuage, or to dispose of it as property in gross; and therefore the right of using it is attached to the occupation of the house. In case the messuage ceases to exist, Sir W. D. Evans conceives that the seat reverts to the general use of the parishioners, or to the general right of disposition belonging to the office of the ordinary. This doctrine does not extend to chapels of ease, or probably to galleries erected by faculty in a parish church.

Where the lessor, after a demise of certain premises with part of a yard adjoining, covenanted that the lessee should have the use of a pump in the yard jointly with himself, whilst the same should remain there; the court held that the words "whilst, &c." reserved to the lessor the power of removing the pump at his pleasure without any reasonable cause, and even to injure the lessee. (m)

Where (n) there was a grant of a convenient way for carts, waggons, wains, and carriages, along a slip of land, with leave to make causeways, and liberty to carry stone, wood, timber, coals, &c. in through over and along the said way, when whither as often and in what manner to him the said grantor, his heirs and assigns, should seem convenient. It was held that the grantee might make a framed waggon way: but as the grant was of a way from A. to B. in through and along a particular way, the grantee was considered not justified in making a transverse road. The framed

(m) *Rhodes v. Bullard*, 7 *East*. 116. (n) *Christian v. Senhouse*, 1 *T. R.* 560.

wagonway above mentioned is a contrivance now used for carrying the coals from most of the collieries in the north of England; and was described in this case to be formed by laying pieces of wood along the road at some depth in the ground, at each side at the distance of the wheels of the carriage, which were joined and kept together by bars at equal distances; the interstices being filled up with sand and gravel, so as to render the surface flat. The principal question however in this case related to his power of making the transverse road, which the court thought he could not do.

In *Gerrard v. Cook*, (o) upon a grant to the owner of a house to pass and repass over a certain piece of ground to and from such house, and all other liberties, powers, and authorities, incident or appendant, needful or necessary to the use, occupation, or enjoyment of the said way; it was held that the grantee was warranted in opening a new door way, and putting down a flagstone of specified dimensions, rising an inch and a half above the surface of the ground; it being found that it was usual to put down flagstones before the doorway, and that the doorway in question might have been used without the stone, but not so conveniently as with it; and the court adopted the proposition stated at the bar, that the grantee may use the way in the manner which is most convenient, if he does not thereby produce inconvenience to the grantor.

If the lessor enjoy a prescriptive right of way, or any other easement by virtue of the demised premises, such right will pass to the tenant for life or years. The only distinction between a tenant for years and tenant for life is, that the former in pleading cannot prescribe in his own right: but he must assert the right through his landlord, or the owner of the freehold. (p)

In *Beaudeley v. Brook*, (q) being an action for disturbance of a way, the declaration stated a bargain and sale of certain land, with a right of way over other land; the declaration was held bad for want of profert of the deed, as a way *de novo* could not be created by a deed taking effect under the statute of uses. This point, although worthy of remark, is not the point as to which Sir W. D. Evans notices the case: but a doctrine, he observes, is stated to have been advanced by some of the judges, which, if

(o) 2 N. R. 109.

Dawney v. Cashford, Carth. 432.(p) *Castrell v. Stephens*, Styl. 309.(q) *Oro. Jac.* 139.

construed liberally, is subject to considerable dispute. They are made to say, that when land is granted with a way thereto, it is *quasi appendant* to the land, and a thing of necessity; wherefore by the lease of the land, (although the way is not mentioned) it well passeth without being expressed in the deed, and therefore the difference will be betwixt a grant of land with common or estovers to be burnt there. *If he lets the land, the common or estovers will not pass without a deed and express words therein*, because they are *profits a prendre in another soil*, which are not of necessity: but the land cannot be without a way; wherefore it shall ensue it and pass of necessity, and unity of possession doth not extinguish it. There may be, observes Sir W. D. Evans, and probably is, some ground for the distinction here referred to, as affecting the land of the lessor himself, upon which the lease is to operate as a new grant: but the expression cited appears evidently to include the case of a lease by a person having right of common or estovers in the land of another, and which is incident or appurtenant to the premises demised, and from the exclusion of which the lessor could derive no benefit, as they could not subsist for his own use as property in gross; and therefore it seems unreasonable that a mere dictum in a case very indistinctly reported, and wholly unnecessary to the decision of such case, should occasion any serious doubt to be entertained, that a right affecting the lands of a third person, (or in the language of the civil law a *servitude*) for the benefit of certain other lands, and merely appurtenant to such other lands, should be considered as so attached to the lands themselves as to accompany all the devolutions of property. In the subsequent case of *Solme v. Bullock*, (q) in which the defendant justified under a grant of turbary from a former lord to J. S. and his heirs, to be burnt in a certain house, which house with the appurtenances were granted to the defendant; upon long special pleading the question was whether the turbary passed by the words *cum pertinentiis*, without being specially mentioned; and the case of *Bowdly v. Brooke* was mentioned as an authority that it did not. But it was held by the whole court that as common appurtenant may be granted at this day, (r) so it might pass by the word "appurtenant" with the land to which it is appurtenant. This case, it must be acknowledged, does not establish the

(q) 3 Lev. 165.

(r) See *Cowlam v. Slack*, 15 East. 108. and *ante* p. 324.

general position, that the right would devolve with the land as attached to it, without any express provision as for example in a common parol lease; yet Sir W. D. Evans apprehends that this doctrine, if not judicially decided, has at least been very generally taken for granted.

In leases of farms, in places where there are extended commons, it is not unusual to qualify the general words by the expression "commons while the same remain open and uninclosed." It is likewise an usual provision in inclosure acts that tenants at rack-rent shall not be entitled to any allotment; but that the commissioners shall be authorised to award them a compensation to be paid by their landlords for the extinction of their rights of common. (s)

A lessee is also entitled to estovers in the land demised on the principle which has been already mentioned; namely, that the grant of a thing carries with it every thing necessary to its enjoyment. The different kinds of estovers are "housebote, ploughbote, firebote, cartbote, and hedgebote;" that is, the lessee is entitled to timber and wood sufficient for fuel and repairs of different kinds. It has been already mentioned that, where timber is required for repairs, the lessor must point out the proper trees: (t) but in general it is the nature of estovers to be taken without assignment, although the right to take without assignment may be restrained by express agreement. (u) The estovers however of one estate cannot be applied to another, for it is essential to the description of a good bote that it should be of utility to the estate itself. (v)

The lessee cannot take fuel but of bushes and smallwood: but if firebote be expressly granted, and there is no other sufficient fuel, it is said he may take great timber. (w)

Botes must be necessary and incident to the grant; therefore, by the grant of a coal-mine, there is no power implied to fell timber to work it with, as cutting puncheons, poles, and other utensils to dig with, or for pipes to carry away the water. (x) So if the lessee build a new house where there was none before, he

(s) MS. observation by Sir W. D. 196.

Evans.

(w) 3 Leon. 16. pl. 38.

(t) *Lisle v. Martin*, Latch. 98.

(x) *Lord Darcy v. Askwith*, Hob.

(u) Dy. 19. a. 115. b.

234. Hutt. 19.

(v) *Lea v. Alston*, 1 Bro. Ch. Ca.

cannot take timber to repair it; and yet, if he pull it down or neglect to repair it, an action of waste lies. (y)

The grantee for years of the rangership of a forest is not entitled to estovers as tenant for years, for the grant is not strictly a lease. The possession of the forest remains in the crown; the keeper is only the officer to preserve it. Therefore, if no estovers are specially given, none can be claimed. (z)

Estovers in other lands than those demised may be the subject of grant *de novo*; and there may be likewise common of estovers, both of which may be appurtenant to a messuage. The grant, however, of estovers in land not leased does not exclude the lessee from estovers in the premises demised. (a)

If a lessee have estovers out of a great wood, and the lessor cut down part, the lessee cannot take that which is cut down; but he must take estovers out of the residue: and if all be cut down, he has no remedy but an action on the case. (b) On the other hand, if the lessor or a stranger carry off estovers which the tenant has cut down for botes, he may have his remedy by action of trover. (c) Where one having estovers cut down some trees for housebote, and in working them found them unfit for the purpose, it was held he could not convert them to any other use; neither could he sell them and buy other wood fit for the purpose. (d)

All other rights, contingencies, and advantages which the lessor is entitled to, in respect of the possession of the premises, pass as necessary and essential parts of the interest contracted to be conveyed: but possessory rights cannot in general be exercised till possession actually taken. But it must also be observed that the lessee takes the land with all its liabilities. If, for instance, the lessor has erected a nuisance, and then demises the land, the person to whom such erection is a nuisance has his election to bring his action against the tenant or the lessor. Holt, C. J. also was of opinion that it would be waste in the lessee to abate the nuisance. (e) So if the landlord, either by prescription or *ratione tenuræ*, must repair a

(y) 1 Bulstr. 50.

(a) Maxwood's Forest Laws, 371. 4 Inst. 297.

(c) Conyer's case, Moor. 6. Hetl. 77. Furefoy v. Gryme, Cro. Jac. 391.

(d) Cro. Eliz. 330. 3 Wils. 337.

(e) Clay. 40.

(d) The Earl of Pembroke's case, Clayton 47.

(e) Rosewell v. Prior, 1 Ld. Raym. 713. Brent v. Haddon, Cro. Jac. 353. Rippon v. Bowls, Cro. Jac. 373. 1 Vin. Abr. 559. fol. 2.

bridge or way, his tenant may be indicted for not doing so, although he possess only a chattel interest in respect of which he cannot be charged *ratione tenuræ*. (f)

It may be further observed as incidental to this part of the subject, that as tenants in common and joint-tenants may have partition by writ, as a matter of right, so if one tenant in common or joint-tenant in fee leases his share for life or years, whatever may be the inconvenience of partial partition, such tenants of a limited interest have a right to the writ of partition at law; and they have the same right to a commission in equity by bill if the title be clear: but this kind of partition is only binding during the particular estate. (g) Originally tenants in common and joint-tenants could not have compelled the others to come to a partition, which was remedied by the stat. 31 Hen. VIII. c. 1. (h) giving them the same right that parceners had; and in the following year that was extended to persons holding limited interest only for life or years. (i)

Before the stat. 8 & 9 W. III. c. 3. (k) it does not appear that if on a partition against the lessor, coparcener, or joint-tenant, too little should be allotted to her or him, that the termor could have any remedy. By this statute, (l) however, it is provided, that after process of *pone* or attachment returned on a writ of partition, affidavit being made by any credible person, of due notice to the tenant or tenants of the action, and a copy thereof left with the occupier, or tenant or tenants; or if they cannot be found to the wife, son, or daughter, (being of the age of 21 years or upwards) of the tenant or tenants; or to the tenant in actual possession by virtue of any estate of freehold, or for term of years or uncertain interest, or at will at least forty days before the day of return of the said *pone* or attachment: if the tenant or tenants to such writ, or the true tenant, shall not enter an appearance within fifteen days, the court may proceed to examine the defendant's title, and give judgment by default. By the second section it is provided that such tenant or other person may appeal within a

(f) *Rapin v. Bucknall*, 3 Ld. Raym. 304.

(g) *Baring v. Nash*, 1 Ves. and B. 351.

(h) The act extends to Wales. Irish stat. 23 Hen. VIII. sess. 1. c. 10. s. 2.

(i) Stat. 32 Hen. VIII. c. 32. Irish stat. 10 Ch. I. scss. 1. c. 10. s. 4.

(k) Irish stat. 9 Wm. III. c. 37. s. 1.

(l) Made perpetual by stat. 3 & 4

Ann. c. 18. s. 2. See Dy. 52 a. pl. 20.

year; or in case of infancy, coverture, *non sanæ memoriæ*, or absence from the kingdom, within one year after such disability is removed. By the 4th section it is enacted, that after partition the tenants or occupiers of any purpart or share before the partition shall be tenants of such parts as are set out to their respective landlords by and under the same conditions, rents, covenants, and reservations: and the landlord shall warrant the land set out in the same manner as he was bound to do the undivided part or share.

With respect to emblements, it has been seen that if the lessee at will has determined the will by his own act, he is not entitled to emblements: the same principle applies to cases where the lessee has determined the lease by his own act, whether that act be lawful or tortious. Neither can an under-lessee be in a better condition than his lessor in this respect; therefore, if a feme tenant for life *durante viduitate* lease at will, and then marries after the land is sown, the tenant at will will not be entitled to emblements.

All things which grow by the manurance and industry of the owner are emblements: therefore, hops growing out of roots at the time of the death of the tenant for life are emblements, and will go to his executor. (m)

The emblements, however, do not give a title to the exclusive occupation of the land: therefore if the executors occupy till the corn or other produce be ripe, it seems that the landlord may recover rent by an action for the use and occupation. (n)

If one of two joint-tenants agree that the other shall sow and occupy the land alone, and he does sow the land and dies, the executor shall have the corn, because he was tenant at will to his companion: but if they had jointly sowed the land, the survivor would have been entitled to all. (o) Where therefore baron and feme were joint-tenants for life, and the baron sowed the land and died, the court were divided whether the executor of the baron should have the corn: but, from analogy to the preceding case, it should seem to be clear that the executor could have no title; for the act of the baron being merely in the course of good husbandry, ought to be considered the act of both. (p)

(m) *Latham v. Atwood*, Cro. Car. 515.

(o) *James v. Portman*, Cro. Eliz. 314.

(n) See Plow. Qu. 239.

(p) *Arnold v. Skanle*, Noy. 149.

A singular case occurs, with reference to this part of our subject, in Lord Coke's Reports. (q) The case is thus stated by Lord Coke. Between Sir Henry Knivett, plaintiff, and Pool and another, defendant, on special verdict the case was as follows: Tenant for life, remainder in fee to the plaintiff; tenant for life leased for years, lessee for years is ousted, and the tenant for life disseised; the disseisor makes a lease for years, and his lessee sows the land, and tenant for life dies, (the corn not being severed). Sir Henry Knivett, who had the remainder in fee, enters; the defendants take the emblements; and for them Sir Henry Knivett brings action of trespass; and on *rien culp.* pleaded, the jury find the special matter aforesaid: and it was adjudged that the plaintiff being in remainder had no right to the emblements. It was also resolved that the defendants claiming by the lessee of the disseisor had not the mere right to them, but in respect of his possession, should bar the plaintiff: but the mere right was in the lessee of tenant for life, and he might have action of trespass, and should recover the mesne profits against the lessee of the disseisor. Therefore, he in the remainder should not have remedy for them, nor should he recover damages for them; lest the lessee of the disseisor should be twice charged. But, as far as respects the entry into the land to take the emblements, this was good matter of justification: but inasmuch as they had pleaded *rien culp.* the plaintiff had judgment for the entry, and was barred of the residue. Lord Coke adds, *Nota*, Reader, in the principal case the lessee of the tenant for life had right to the land, and of consequence to the emblements, as things annexed to land; and the death of the lessee for life determines his interest in the emblements remaining; and this was the principal reason of the judgment. The report of the same case in Gouldsborough does not seem to be sufficiently accurate. In Cro. Eliz. 443. it is given nearly to the same effect as in Lord Coke's Reports: but the principle is more clearly stated. Tanfield, for the plaintiff, argued that the emblements belonged to him in remainder. To Hawkins the first lessee they appertained not; because he did not sow them at his own cost, nor was in possession of the land at the time of his estate determined: and the sole reason, he said, why a lessee, whose estate is determinable upon

(q) Sir Henry Knivett's case, 5 Rep. 85. a. Gouldsb. 143. S. C. Knivett v. Pool, Cro. Eliz. 463. S. C.

an uncertainty, shall have the emblements is, because they arise out of his labour and costs. (r) But if he were not at the cost and labour to sow it, he shall not have the corn : but he that should have the land shall have the corn ; for *quicquid plantatur solo, solo credit*. And therefore, if a man sow land and let it for life, and the lessee for life dies before the corn be severed, his executors shall not have them, but he in reversion. So if tenant for life sows the land, and grants over his estate, and the grantee dies before the corn be severed, his executor shall not have the corn ; which cases Gawdy and Popham agreed. So in Mich. 29 & 30 Eliz. it was said there was a case in this court where a man sowed his land, and devised his lands for life, remainder in fee ; tenant for life dies, the corn not severed : the question was, whether the executor, or he in remainder, should have it ; and held that he in remainder ; which case they all agreed. Then here is strong reason against the first lessee that he should not have it : but if he had entered, living the tenant for life, and had continued his possession until his death, it had been otherwise ; for then it should be construed as if he always had continued in possession, and had sown it himself. But when he did not enter, it was his folly and his laches to prejudice himself ; and the disseisor nor his lessee for years shall not have them, for their estate is uncertainly determined by their own tort, which the law will never regard, nor give any privilege thereto, wherefore, &c. But all the justices, (*absente* Clinch) resolved to the contrary, that the corn appertained to Hawkins, the first lessee of the tenant for life ; for he having right to it at the time of the death of tenant for life, the law shall preserve his title and right, as if he had entered. For Gawdy said, if he had entered in the life of tenant for life, it is clear that he should have had the corn : now when he could not enter, the law supplies his entry, as in 19 Hen. VI. 28. ; tenant *pur autre vie* is disseised ; he shall not have trespass for mean profits till re-entry : but if *cestui que vie* dies, so as he cannot re-enter, the law shall give him the action without re-entry. Then lessee for years having right to have them in the lifetime of the tenant for life, it is not reason that it should be taken from him by the uncertainty of the death of the tenant for life.

If the lessee for life of a manor seises an estray, and dies before the year and a day, the executor shall have it, and not the re-

(r) Bro. Tit. Emblements, *Plac. Ultimo*.

versioner : for after the year and a day it has relation to the seizure. (s)

When (t) the lessee for life of a house and pasture land dies, the law allows a convenient time to remove the cattle in ; and in one case six days were not considered unreasonable, especially as it was averred that the executors had no place to put them in.

After the lease ended, the hay, straw, litter, fodder, dung, manure, and compost, on the land belong to the landlord, and cannot be removed by the tenant, nor is he entitled to any compensation for them. (u)

An exception generally relates to some existing component part of the thing demised, which is capable of being severed and distinguished from it. A reservation is properly of some right or profit which had previously no separate existence.

No exception can be made of things, which are of the essence of the thing granted. Therefore, where (v) the dean and canons made a lease of a manor excepting the courts and perquisites ; it was resolved that the exception was good as to the perquisites, but bad as to the courts : although in the king's case the exception of the courts might be good by force of his prerogative. (x) So where (y) a lease was made of a manor for years, excepting all casualties and profits of courts, which severally did not pass the value of 6s. 8d., and then the lessor sold the reversion ; and a composition was made between the lessee and the reversioner, by which the lessee granted and covenanted that he would permit the reversioner to hold the courts, and to take the profits to his own use : it was held that this covenant was void ; for, although the reversioner might have authority to hold courts, yet it must be in the name of the lessee. In the same way it has been said that if a rectory be let, excepting the glebe, the exception is void, because the glebe is essential to a rectory. And the same law is of a manor *eo nomine* excepting the demesnes : but the lessor may except part of the glebe, or part of the demesnes. (z) The lord, however, may grant a lease of the inheritance of the copyhold, and

(s) Moor. 11. pl. 43.

(t) Stodden v. Hervey, Cro. Jac. 204.

(u) *Ex parte* Nixon, cited 2 Madd. Ch. Ca. 219.

(v) Brown v. Goldsmith, Moor. 870.

Windham v. Wray, 4 Taunt. 316.

(x) Acton's case, Dy. 288 b.

(y) Wheeler v. Twogood, 1 Leon.

118.

(z) Mabie's case, Winch. 23.

the grantee will be entitled to hold a customary court for the convenience of the copyholders. (a)

Where the exception goes to the whole thing granted, the exception and not the grant is void : as, for instance, where (b) there was a grant of all the lessor's lands in L. except the manor of D., and it was found that the lessor had no other land in L., the manor was held to pass. So in a demise of twenty acres, excepting ten of them, the exception is void, unless the words "twenty acres" amount to a specific description of a certain parcel of land, and do not merely mean the grant of ten acres, and then other ten. (c) So, in a demise of a house and shops, an exception of the shops is repugnant and void. (d) But if there are more shops than two, the passing of two being sufficient to satisfy the words, the exception of the rest would be good.

An exception generally is an absolute exception during the lease : (e) but the lessor may except for a limited period. (f) If, however, he grant for a term and except for his life, it is bad. (g) So also an exception may be till a contingent event happens : and after the event happens the legal right will pass without any further conveyance ; (h) for in this and in every other particular an exception is governed by the same rules as a grant.

The following cases depended merely on the verbal construction of the exception. The first (i) was the lease of a manor with the appurtenances, and the rents of all the tenants, tithes of corn, perquisites of courts and all other the emoluments, the advowson, &c. being excepted, the exception was held to commence from the words advowson, &c. which is the natural construction of the sentence, according to the maxim *verba fortius accipiuntur contra proferentem*. Another case (k) of construction was where A. conveyed to B. a messuage, building, yard, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the said land, with liberty to enter and make pits for getting the same, and to erect engines and make drains necessary for working the

(a) 4 Rep. 26. b. Jackson v. Neale, Cro. Eliz. 394.

(b) Darrell v. Collins, Cro. Eliz. 6.

(c) Miller v. Pratt, cited Dy. 266. b. in margin.

(d) Hornby v. Clifton, Dy. 266. b. in margin.

(e) Hornby v. Clifton, 1 And. 52.

(f) Cudlip v. Rundle, Carth. 202. Dy. 167.

(g) Per Holt, C. J.

(h) Cartwright v. Amott, 2 B. and P. 43.

(i) Wiltshire v. James, Dy. 58. b.

(k) Bowler v. Wolley, 15 East. 444.

coal, except as to such lands as lie within one hundred and fifty yards of the messuage and buildings, and except any homestead. It was held that the right was reserved to dig coals from and under the messuage or dwelling-house and homestead, and within one hundred and fifty yards from the same; but not to sink pits or shafts, or to erect engines within one hundred and fifty yards, &c. If a rectory be leased, excepting the mansion-house saving a chamber to the lessee, the chamber will pass by the lease. (l)

Since timber trees are parcel of the inheritance, they cannot be excepted by the lessor, if he has only a particular estate in the land, further than to protect himself from the penalties of waste, and to preserve to himself the loppings and shade after the end of the underlease. (m) If the timber in that case becomes severed by accident, or otherwise, during the lease, it becomes the property of the owner of the first vested estate of inheritance; and all the special property of the tenant ceases with the severance. (n) Since it is the definition of an exception, that it should relate to a pre-existent component part of the thing demised, if trees are excepted, this can only refer to the individual timber trees then growing on the premises. A reservation, however, of such trees as shall grow may be made in the same way as the reservation of any other profit arising out of the land. (o) So an exception of great trees will include all trees which may be great during the lease. (p)

By an exception of all trees, wood, &c. appletrees, or trees which are not timber, are not excepted, the wood in the exception being considered to mean trees useful for their wood: (q) but if the lessor specifically mention appletrees, and except all other trees, all other fruit trees will be excepted. (r)

If trees are excepted, the lessee has no interest in them; and the lessor may have trespass against him, if he either fells or injures them: where, however, there was a demise of pasture ground excepting trees, and the cattle of the lessee barked them, it was

(l) *Leigh v. Shaw*, Cro. Eliz. 372.

(m) *Bacon v. Gyrling*, Cro. Jac. 296.
Sanders v. Norwood, Cro. Eliz. 683.
Foster v. Spooner, Cro. Eliz. 17.
Lewknor v. Ford, Godb. 114. *Percy's case*, 13 Rep. 60.

(n) *Whitfield v. Bewitt*, 2 P. Wms.

240. *Pigot v. Bullock*, 1 Ves. J. 479.

Udal v. Udal, All. 81. 3 P. Wms. 267.

(o) *Wyndham v. Way*, 4 Taunt. 316.

(p) *Gamock v. Cliff*, 1 Leon. 60.

(q) *Wyndham v. Way*, 4 Taunt. 316.

(r) *Lord Zouch v. Moor*, 2 Roll.

Rep. 280.

held that the action would not lie, because it was the business of the lessor to fence and protect them. (s)

The lessor has a liberty in such cases to sell and take them away, although for greater caution the power is frequently reserved. So he or his servants may enter for the purpose of viewing and selecting those which are fit for sale. This power also is assignable, being coupled with an interest; but if it be not properly pursued, trespass will lie against the lessor or his assignee. (t) So, although trees are not excepted, yet if they be severed, the property instantly vests in the owner of the inheritance, and such person may enter and take away his property without committing a trespass. (u)

If a manor be leased, excepting the timber trees, and the lessee grants copyholds, there is no restraint upon copyholders shrouding the trees, because they come in by the custom paramount the exception. (x)

Where the defendant excepted or reserved all trees and timber-like trees and pollards, and all plants and shrubs which were or might be planted; and afterwards permitted the lessee to convert several acres into pleasure ground and lawn; the Court of Chancery restrained him from cutting down any of the ornamental timber on the lawn. (y) Since the lessee has no interest in trees which are excepted, no waste can be committed in cutting them. (z)

By the exception of trees only so much of the soil is excepted as gives nourishment to the trees; (a) and the lessee is entitled to the underwood and herbage. (b) But by the exception of woods and underwood, (c) or coppice, (d) the soil is excepted. Where, (e) however, there was a lease of a tenement, a close of which was a wood, and known by the name of a wood; and in the lease was an exception of all saleable wood then growing, or which should grow thereafter, which had been usually sold by the lord of the premises,

(s) *Glenham v. Hanley*, 1 Lord Raym. 739. *Clithers v. Higgs*, W. Jop. 383.

(t) *Warren v. Arthur*, 2 Mod. 317. *Seabeverell v. Dale*, Poph. 193. Latch. 153, 268.

(u) *Hepkenden's case*, 4 Rep. 62.

(s) *Swayne's case*, 8 Rep. 63.

(y) *Jackson v. Cator*, 5 Ves. 683.

(a) *Goodright d. Peters v. Vivian*, 8 East. 110. Dy. 19. a. pl. 100.

(b) *Liford's case*, 11 Rep. 52. a.

(c) Dy. 79. a. pl. 48.

(d) *Ives's case*, 5 Rep. 11.

(e) *Hide v. Whistler*, Poph. 146. *Whistler v. Parslow*, Cro. Jac. 487.

(f) *Fincomb v. Thomas*, Cro. Jac.

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with free entry, regress, and egress, for falling and carrying away the same at all times convenient, it was held clearly that the soil was not excepted.

In one case, (*f*) where the crown made an exception of "great trees, woods, and timber," (*g*) and there was a proviso that the lessee should have sufficient housebote and hedgbote, two justices thought the grant of botes shewed the intent that the underwoods should be excepted; but Gawdy, J. said, in the case of a common person underwoods would clearly not be excepted.

Where in a lease a grant is made of timber trees, excepting to the lessor forty or any other number of trees to take at his pleasure, the lessor must exercise his election in convenient time; otherwise the lessee may cut, leaving the number of trees excepted according to the words of the exception. (*h*)

If a lease is made with a proviso that the lessor and his heirs at any time during the lease may fell timber, this is no exception, but merely enables the lessor to enter and cut timber, which he could not otherwise do without licence of the lessee. (*i*)

If the trees are excepted, the lessor has them as an inheritance, and not as a chattel. They are annexed to the reversion; and will pass with it, even where the reversion is granted, by the name of the reversion. (*k*) So where (*l*) J. S. leased a manor, excepting all woods and underwoods, and afterwards made another lease to the same lessee for sixty years of all such woods and underwoods, and then made a third lease to the same lessee for thirty years, to commence after the first term of thirty years, it was held that the woods and underwoods continued part of the reversion of the manor, although the soil was excepted; and consequently that it passed by the third lease, which operated as a surrender in law of the second.

If tenant in fee simple or fee tail demise the trees, or sell them, and before they are severed leases the land to the same grantee, this is said to annex them again to the land. The reason seems to be that the qualified interest in the trees taken by the

(*f*) *Kensam v. Beding*, 1 Leon. 247.

(*g*) *Exceptis grossis arboribus, boscis et maribus*.

(*h*) *Cage v. Panlin*, 1 Leon. 116.
Billingsley v. Hursey, 2 Bulstr. 5.
2 And. 123.

(*i*) *Lushford v. Sanders*, Cro. Eliz.

690.

(*k*) *Stamp v. Clinton*, 1 Roll. Rep.

95.

(*l*) *Ives's case*, 5 Rep. 11.

lease of the land operates as a surrender in lieu of the former grant. (m) But if the lessor lease the land, excepting the trees, and then grant the trees to the lessee, the lessee is entitled to them, because the two grants are not inconsistent. And although, where there is a feoffment in fee excepting trees, and then the trees are granted, they are annexed to the inheritance; yet that is by reason of owelty or equality of ownership in the land and the trees; and the absolute power over both is in the same person. (n)

It seems to be generally agreed, that where a conveyance is made by a mortgagee in fee, and the person entitled to the equity of redemption, an exception cannot be made in favour of the latter, as no part of the legal estate proceeds from him: but although words expressed as words of exception might not be operative as an exception, they might enure as a valid grant derived out of the estate conveyed according to the intention of the parties. (o)

In *Chetham v. Williamson*, (p) in which a covenant was contained that it should be lawful for the mortgagor, who joined in the conveyance to get coal, which was determined on other grounds not to be an exception, Lawrence J. observed that the covenant could only operate as a grant: but that a grant would not pass the land itself without livery. This objection cannot apply to a mere liberty and privilege: but Sir W. D. Evans doubts whether it could apply to a grant of any part of the land itself, where the conveyance was by such an instrument as could take effect by virtue of the statute of uses; for in such case the estate conveyed to the feoffee or releasee would be sufficient to support the disposition, which it was the intention of the parties to make, by force of the instrument, of any part of the premises conveyed. To any instrument creating or assigning an estate for years the objection is of course inapplicable; and the court would give effect to the instrument, however informal, in such a mode as would be best calculated to effect the intention of the parties.

The last point which it is requisite to mention in this part of the subject relates to fixtures, or things fixed to the freehold; such as buildings for the purpose of carrying on particular trades

(m) 2 And. 32.

(n) *Herlakenden's case*, 4 Rep. 62. a.

(o) *Chetham v. Williamson*, 4 East.

469. *Moore v. Lord Plymouth*, 7 Taunt. 614. B. 1 Moor. 346.

(p) *Ubi supra*.

upon the land; and fire-grates, stoves, and other things of a similar nature in houses, which are usually made the subject of an independent contract between the parties.

In general, whatever is annexed to the inheritance during the tenancy, becomes part of it; and cannot be removed by the tenant, although done at his own expense. Thus glass put in by the tenant, or wainscot fastened by nails, become part of the inheritance. (*p*) With respect to substantial improvements, they are usually made a consideration for extending the term of the lease; or some collateral agreement is made so as to allow of some compensation to the tenant. (*q*) Without some such previous agreement, it is only the folly of the tenant to build upon another's land, and the law in that case gives no remedy.

There are however some exceptions to this rule, as between landlord and tenant. What is erected for the purpose of trade by the tenant may be removed by him during the term. After the term they become inseparable from the freehold; and can neither be removed by the tenant, (*r*) nor recovered by him as personal chattels by any action either of trover, (*s*) or for goods sold and delivered. (*t*)

A copper and furnace, though formerly considered part of the freehold, are now held to be merely implements of trade, and may be removed. So all brewing vessels, which cannot be used unless they are fixed, fire-engines, pipes fixed in the wall, come under the denomination of fixtures, if erected for the purposes of trade.

This indulgence to the tenant has been carried still farther: and he has been allowed to carry away matters of ornament; such as pier-glasses, chimney-pieces, wainscot only fixed by screws, and things of a similar nature. (*u*)

The leading case on the subject is the case of *Elwes and Mawes*. (*x*) Where a tenant had erected at his own expense

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| (<i>p</i>) <i>Warner v. Fleetwood</i> , cited 4 Rep. 63. b. | <i>Fitzherbert v. Shaw</i> , 1 H. Bl. 255. |
| (<i>q</i>) <i>Burn v. Miller</i> , 4 Taunt. 745. | (<i>s</i>) <i>Davies v. Jones</i> , 2 B. and A. 165. |
| <i>Hoby v. Roebuck</i> , 7 Taunt. 157. | (<i>t</i>) <i>Lee v. Risdon</i> , 7 Taunt. 189. |
| (<i>r</i>) <i>Lord Dudley v. Lord Ward</i> , Amb. 113. Co. Litt. 53. a. Bro. Waste, 104. 143. <i>Cooke's case</i> , Moor. 177. <i>Day v. Bisbitch</i> , Cro. Eliz. 374. | <i>Nutt v. Butler</i> , 5 Esp. N. P. C. 176. |
| <i>Lord Derby v. Asquith</i> , Hob. 234. | (<i>u</i>) <i>Beck v. Rebow</i> , 1 P. Wms. 94. |
| | <i>Ex parte Quincey</i> , 1 Atk. 477. <i>Lawton v. Lawton</i> , 3 Atk. 13. |
| | (<i>x</i>) 3 East. 38. |

a carpenter's-shop, a fuel-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled; and the foundations of them were about a foot and a half deep in the ground. The carpenter's-shop was closed in; and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. It was a part of the case, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. The court held that the tenant could not remove them during the term, and took the distinction between annexations to the freehold for the purpose of agriculture, and those for the purposes of trade.

Where the superincumbent building is erected as a mere accessory to a personal chattel, it may be removed: but not where it is necessary to the freehold. In the case of *Lawton v. Lawton*, (y) and *Lord Dudley v. Lord Ward*, (x) the fire engine was an accessory to matter of a personal nature, to the carrying on a trade of getting and vending coals. So a cyder mill is accessory to the trade of cyder-making. (a) Saltpans in Cheshire, and other salt countries, are an exception, because the saltpits in those counties are a valuable inheritance; and the saltpans and wyche-houses are a means of enjoying the inheritance, and are not to be considered as accessory to carrying on a trade merely as such. (b)

In *Dean v. Allaley* (c) at *Nisi Prius*, Lord Kenyon thought that Dutch barns were removeable, although these buildings have a foundation of brick let into the ground, and their roofs are supported by upright pieces of wood fixed in and rising from the brick work: but this case did not undergo a subsequent review by himself and the rest of the court. A barn on pattens and blocks of timber may clearly be removed. (d)

In *Penton v. Robart* (e) the varnish house with a brick foundation let into the ground was for the purpose of trade, and therefore the tenant was entitled of course to remove it. Great gardeners and nurserymen near London may in the same way

(y) 3 Atk. 43.

(x) Amb. 113.

(a) See 3 Atk. 13.

(b) *Lawton v. Lawton*, *supra*.

(c) 3 Rep. N.P.C. 11.

(d) Bull. N.P.C. 24. 4 Leach. 241.

(e) 2 East. 28. 4 Rep. N.P.C. 197.

remove their greenhouses and hothouses, and even their trees by the thousand. (f) A conservatory however erected on a brick foundation, and attached to a dwelling house with a communication by windows opening from the house into the conservatory, and a flue passing out of the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant. (g)

Where (h) certain parts of a machine had been put up by the tenant during the term, and were capable of being removed without injuring the other parts of the machine, and had been usually valued between the out-going and in coming tenant; these were held to be mere personal chattels of the out-going tenant, for which he might maintain trover after the term ended.

Since fixtures form part of the inheritance, and may ultimately be inseparable from it, waste may be committed by the destruction of them. (i) On this principle it is waste in an outgoing tenant to plow up strawberry beds in full bearing; although when he entered he paid for them on a valuation to the person who occupied the premises before, and although it may have been usual to appraise strawberry beds between the outgoing and in-coming tenant. (k)

In consequence of the state of the law upon the subject of waste, the clause "without impeachment of waste" has found its way into settlements of estates, and into leases. This clause not only relieves the tenant from the penalties of the statute of Gloucester; but will allow him to make all reasonable profit of the timber, if he cut it at reasonable times, and in a husbandlike manner. (l)

The court of chancery, however, has been in the habit of restraining an unconscientious use of the power in committing destructive waste, or permitting houses to go into decay. (m) So where lessee for years without impeachment of waste, with a reversion to a bishop, dug the ground for bricks, he was restrained

(f) See *Buckland v. Butterfield*, 227.

2 Brod. and Bingh. 54. *Wyndham v. Way*, 4 Taunt. 316.

(g) *Buckland v. Butterfield*, 2 Brod. and Bingh. 54.

(h) *Davis v. Jones*, 2 B. and A. 165. *West v. Treforth*, W. Joh. 524.

(i) *Kilmington v. Eve*, 2 Ves. and B. 349.

(k) *Weatherall v. Howells*, 1 Campb.

(l) Lord Tenterden v. Earl Perceval, 6 Ves. 419. *Wickham v. Wickham*, Coop. Ch. Ch. 286.

(m) Lord Barnard's case; 11th. Eq. Rep. 127. *Aston v. Aston*, 1 Ves. 265. *Anon.* 2 Freem. 278. *Abraham v. Dudd*, 2 Freem. 63. *Partridge v. Powlott*, 2 Ark. 383.

from digging more, although he was allowed to carry off the bricks already made. (*n*) So a tenant, without impeachment of waste, cannot cut timber planted for ornament or shelter. (*o*) But in a late case, (*p*) the lord chancellor did not think proper to restrain such a tenant from felling timber fit for the purposes of timber, though young, and not such as would be felled in a husbandlike management of the estate.

The reader should bear in mind that such a clause is unusual in leases arising upon contracts between landlord and tenant; and that the cases cited are chiefly upon limitations of particular estates in family settlements. It might be a question therefore at law, whether the principles of these cases are applicable to farming or husbandry contracts.

In a recent case, (*q*) the vice-chancellor seemed to think that a tenant for life "*sans waste*" might lease for years, not declaring the lessee unimpeachable for waste, but with a licence to fell timber, because the clause of "*sans waste*" gave the interest in the property severed to the tenant for life.

VI. The next point for consideration is the limitation of the estate.

Leases for life may be granted either for the grantee's own life, or to several people for their joint lives, or to one for the joint lives of several others; and every indefinite grant is a grant for life. But since a man's own life, as far as he is considered, is of a greater value to him than the life of another person, an estate for a man's own life is greater than for the life of another person. In another point of view, namely, with respect to the grantor or any stranger, the life of another is of greater probable duration than the life of the grantee.

If a lease for years determinable on lives be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours as often as a *cestui que vie* dies to renew by purchasing a new life, it is no breach to renew upon his own life. (*r*)

(*n*) Bishop of London v. Web, 1 P. Wms. 527.

(*o*) The Marquis of Downshire v. Lady Sandys, 6 Ves. 107. Chamberlayne v. Dummer, 3 Bro. Ch. Ca. 549. Lord Lansdown v. Lady Lansdown, 1 Madd. Ch. Ca. 136.

(*p*) Smythe v. Smythe, 2 Swanst. 251.

(*q*) Davies v. The Duke of Marlborough, 2 Swanst. 145.

(*r*) Scudamore v. Stratton, 1 B. and P. 455.

If an estate for life is granted for the joint lives of two or more persons, or the estate is limited to two or more for their joint lives, it is an estate for the joint lives of the *cestuis que vie*, and for the lives and life of the survivors and survivor of them, without the addition of the words, "and for the lives and life of the survivors and survivor of them;" the law implying the life of the survivor to be part of the estate granted, without words to that effect. (s)

A freehold lease cannot be made to commence *in futuro* at the common law, except by way of remainder. If it be limited to take effect as a contingent remainder, there must be a previous vested estate of freehold to support it; which rule applies equally to a contingent limitation by way of use. Estates for life, however, may be created to commence *in futuro*, by way of springing or resulting use; or they may take effect by force of the statutes of wills within the limits of executory devises.

If the limitation of an estate *pur auter vie* be to a man, his heirs, executors, administrators, and assigns, the heir takes in preference to the executor. (t) In some cases, (u) indeed, it has been doubted whether executors could be special occupants: but this opinion seems to have arisen from a confusion between corporeal hereditaments and incorporeal hereditaments, such for instance as rent, of which at the common law there could be no occupants. (x)

If a lease be made by deed to a man and his heirs *habendum* to him for three lives, this is not a fee, but a freehold lease for three lives; because there is no inconsistency in the grant, and thereby

(s) Brudenel's case, 5 Rep. 9.

(t) Atkinson v. Baker, 4 T. R. 229.

(u) See Campbell v. Sandys, 1 Sch. and Lefr. 281. Per Lord Redesdale, and Sugd. Pow. 195. 3d edit. *in notis*.

(x) In opposition to the doctrine laid down by Mr. Sugden, in the latter part of the note just cited upon the authority of Lord C. B. Gilbert. (Bac. Abr. tit. Estate for life, s. 3.) Sir W. D. Evans has the following observations: In Rawlinson v. The Duchess of Marlborough, 2 P. Wms. 268. n. D. Lord

Harcourt seemed to be of opinion, that if a rent were granted to A. for the life of B., and A. died living B.: A.'s executors should have the rent. In a subsequent case, (Kendal v. Mirfield, Barn. Ch. R. 46.) reported in a book of but little estimation in point of authority but which in the particular case has the internal appearance of correctness, the master of the rolls seems to have been clearly of opinion, that since the statutes the limitation of a rent charge for lives to a person and his executors would be

all parts of the deed take effect. (y) Originally indeed the premises and the *habendum* of a deed seem to have had distinct offices; that of the premises being to name the parties, and to ascertain the thing granted; and the office of the *habendum* to name the grantee, and to limit the certainty of the estate. As however it is the practice to insert words of limitation in the premises, the courts of law no longer consider the premises and the *habendum* as two distinct parts of the deed: but they judge of the whole deed, taking all its parts together, so as to give effect to the intention of the parties. If therefore in a deed general words be used, and afterwards in the *habendum* special words not inconsistent with such general words are used, the special words will either enlarge or restrain the general words according to the obvious grammatical construction of the whole deed or the intention of the parties. Upon this principle, if the grantee be named in the premises without any words of limitation, which at the common law will pass an estate for life, and in the *habendum* the estate limited is for years, the grantee will only be a lessee for years. If, however, to the estate limited in the premises livery of seisin is necessary, and livery is made, there, although the *habendum* be for years, the estate passes by the livery. (z) If the *habendum* is repugnant to the premises, there the whole estate shall take effect out of the premises; for the rule is, that where there are contrarieties in the several parts of a deed, the latter is void, and the first part shall stand; (a) therefore where a lease was made to two *habendum* to them, and two others for their four lives; it was held that the two not named in the premises could not take. (b) So where there was a lease to three jointly, provided that B. should not take the profits during the life of A., nor C. during the life of B.; this proviso was held repugnant and void, because an estate cannot be limited jointly and seve-

valid: but the case was decided on a different point. In practice nothing is more common than the grant of an annuity to a person and his executors, out of freehold property during the life of the grantor: but the right is usually so guarded by collateral provisions, that the validity of such a grant as a general proposition is not

likely often to come in question.

(y) — *v. Pist*, 2 Keb. 865.

(z) *Baldwyn's case*, 2 Rep. 23. a. But Mr. Preston (1 Shep. T. 76.) makes a query of this law.

(a) See Wood's *Conveyancing by Powell*, Vol. I. p. 224. note.

(b) *Kirkman v. Reignott*, 4 Leon. 3.

rally. (c) But in a demise to three *habendum* to one for life, remainder to another for life, remainder to the third for life, the *habendum* is good, because there is no inconsistency; and it is the proper office of the *habendum* to explain the premises. (d)

With respect to estates for years the essence of the contract is, that the term should be fixed and unalterable, subject only to such conditions and contingencies as may be agreed upon by the parties for the termination of the lease before its regular expiration by effluxion of time. The certainty of the term granted may be ascertained, either by the express limitation of the parties, or by reference to some collateral circumstance, which may with equal certainty measure its continuance. If A. for instance leases to B. for so many years as B. has in the manor of Dale, and B. has then a term of ten years in that manor, this fixes the term as well as if A. had expressly leased for ten years. (e)

If the taking be for any fractional part of a year, it may be useful to recollect that the legal month is the lunar month of four weeks or 28 days. That the legal quarter of a year is 91 days; the legal half-year 182 days; and the whole is 365 days; the law neglecting the odd hours or fractions of days. (f)

If a lease be made for years without specifying the precise number, this has been considered to be good for two years; *ut res magis valeat quam pereat*. (g)

A general taking at an annual rent is a lease from year to year: but if an agreement is made to let premises, as long as both parties please, reserving a compensation *de die in diem*, and not referring to a year or any aliquot part of a year, it is strictly a tenancy at will. (h)

An agreement for a lease at a certain rent, and that the lessor should not turn out the lessee so long as he paid the rent, and should not sell any article injurious to the lessor's business,

(c) 5 Rep. 19. a. *Scovels v. Cavell*,
1 Leon. 317. *Livessage v. Cables*,
Moor. 267.

(d) Dy. 160. b. pl. 43. *Dowse's case*,
Cro. Eliz. 25. Moor. 26. pl. 87. *Green-*
wood v. Tyber, Cro. Jac. 563. *Grub-*
ham's case, 4 Leon. 246.

(e) Co. Litt. 45. b. *Boraston's case*,
3 Rep. 19.

(f) Dy. 345. a. pl. 5.

(g) Bro. tit. Lease 13.

(h) *Richardson v. Langridge*, 4
Taunt. 128.

either purports to be a lease for life ; or if by parol, will operate as a tenancy from year to year. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, has long since been exploded. (i)

If a lease is made for one year, and so from year to year, as long as both parties please ; it seems to be the general opinion of the profession, founded on the authority of the case of *Denn d. Jacklin v. Cartwright* ; (j) that it is a lease for two years at least : but the authorities do not appear to have been well considered by the court in that case. (k) Since, however, the case of *Denn v. Cartwright*, it has been held at *nisi prius* that, upon a taking for 12 months certain, the tenancy might be determined at the end of the first year : but the court laid great stress on the word " certain." (l)

It is clear, however, that after the first year every new year is a springing interest arising on the first contract ; so that neither party can determine the tenancy before the end of the current year. After the first year the lessee becomes tenant for years ; so that if rent is arrear for one of two years and part of another, it may be alleged to be due upon one entire lease ; (m) neither is this contrary to the statute of frauds, if the lease is made by parol, because the statute has reference only to the number of years prospectively. (n)

A tenancy from year to year has become, in modern times, a very general species of letting : the law likewise, in many cases, implies it ; because it is more convenient than a tenancy at will. Thus the receipt of rent by the remainderman or reversioner after a lease has become void, or is expired, is evidence to be left to a jury of a tenancy from year to year ; and if no other tenancy appears, it will be presumed that such a tenancy existed during the time for which the rent was paid. (o)

(i) *Doe d. Warner v. Browne*, 8 East. 165. *Doe d. Rigge v. Bell*, 5 T. R. 471.

(j) 4 East. 31.

(k) Compare what is said by Lord Ellenborough, C. J. with the cases. *Birch v. Wright*, 2 T. R. 380. *Harris v. Evans*, Amb. 329. 1 Wils. 262. *Gockerell v. Owerall*, Cases, t. Holt. 417. *Dod v. Monger*, 6 Mod. 215. *Anon.* 42 Mod. 610. *Gostwicke v.*

Mason, 1 Mod. 3. 2 Keb. 543. *Agard v. King*, Cro. Eliz. 775. Year book, 14 Hen. VIII. 10 B. cited 6 Rep. 35. b. *Keilw.* 163.

(l) *Thompson v. Maberley*, 3 Campb. N. P. C. 573.

(m) *Botting v. Martin*, 1 Campb. 317.

(n) *Birch v. Wright*, 2 T. R. 380.

(o) *Roed. Jordan v. Ward*, 1 H. Bl. 97. *Doe d. Martin v. Watts*, 7 T. R. 83.

In the case of *Roe d. Brune v. Prideaux* (p) upon a special verdict, it was contended that the principle upon which a tenancy from year to year was implied was that the rent was a compensation for the land: therefore, that if the antient rent bore no proportion to the rack-rent, no such tenancy could be implied; because the antient rent could not be a compensation for the land. The case of *Right d. Dean of Wells v. Bowden* (q) was cited in support of this position; where on a special case it appeared that certain copyhold lands had been demised, by copy, to A. for the lives of B. and C.; after the death of A., B. was admitted, and died in possession, having paid the reserved rent during his life: and his widow was held not entitled to her freebench; but that was because he was a mere *cestui que vie*; and the payment of rent did not create a tenancy from year to year, because it expressly appeared that there was another tenancy neither void nor unexpired, in respect of which the payment of rent was made.

Where land was leased for one year, and over for nine years or twelve, as should be determined by a stranger, and no term was fixed, the lessee holding over was considered a tenant at will; for the agreement made it so, and shut out tenancy by sufferance. (r)

If a lease is made for ten years at the will of the lessor, it is a good lease for ten years certain, because the last words are void for repugnancy. So if a lease be made at will for a year, and so from year to year, it is a lease at will only on the same principle. (s)

A limitation, however, from year to year, till fifty or more years are completed, is a good lease for the whole term; or rather it is only the old mode of effecting what is very usual in modern times; for it is a lease for so many years determinable at the option of the parties at the end of every year. (t)

It may be observed, with reference to the execution of agreements for leases, that in certain cases from reasons of public policy, the nature of the purpose for which the land is to be granted

(p) 10 East 163. *Doe d. Brune v. Year book*, 15 Edw. IV. 6.
Rawlins, 10 East. 261.

(s) *Bro. Lease*, 13, 22.

(q) 3 East. 266.

(t) *Bac. Abr. Lease*, I. 3.

(r) *Bedford v. Johnson*, 2 Sid. 153.

will often determine the period for which the lease should be made. Thus farming leases are generally for twenty-one years or three lives, or for some period of years determinable on lives; and building leases are generally for ninety-nine years absolute.

The next point to be considered in this part of our subject has reference also to the same object; namely, the certainty of the duration of the term. A lease for years must have a certain beginning, and a certain end. The commencement, however, may depend upon a contingency, or condition precedent; or it may depend on an event which will probably happen, but which may be uncertain as to the precise time of its arriving.

If a term of years be created *de novo* to A., if he so long live, and if he dies within the term then over to B. for the residue of the term which shall be unexpired; this is a good lease in remainder to begin *in futuro*: and it is sufficient that when B. takes possession, the term will be reduced into certainty. (u) So any number of limitations of the same nature will take effect as remainder; and a present interest in the nature of a term of years will pass if the grantees are *in esse*; if they are not *in esse*, no estate of freehold is requisite to support such a remainder, although in its nature it is contingent. (v)

If a lease be made for so many years as A. shall name, the fixing of the number of years is a condition precedent, and no interest will pass so as to charge the land till A. names the period. (x) So if a term is limited to commence on B's paying a sum of money to the lessor, this is a condition precedent to the lease taking effect. (y) It is essential in these cases that the lease should be reduced into certainty in the lifetime of the lessor, because after his death no interest can pass out of him. If, therefore, the lessor leases for so many years as his executors shall name, this lease is void, because the executors cannot be *in rerum natura* till after the death of the testator. It seems also to be equally essential that the grant should be reduced into certainty in the lifetime of the lessee; for his executors or other personal representatives

(u) Wright v. Cartwright, 1 Burr. Fearn's Cont. Rem. c. 2. s. 2.

282. Co. Lit. 45. b. 3 Leon. 200. pl.

252.

(x) Plowd. 273. b. Co. Lit. 45. b.

(y) Co. Lit. 45. 6 Rep. 35. a. 1

(v) The Rector of Chedington's case, 1 Rep. 153. contra. But see

Roll. Rep. 849.

cannot take what has not been vested in the testator or intestate. (z)

If a lease be made to A., B., and C., for their lives, and a covenant that the land shall remain to the assigns of the survivor for years; this is not a mere naked power of nominating, but it is a good lease and interest in the survivor. (a)

Inaccuracies in the limitation of the time at which a lease ought to commence have generally been remedied by the courts. It has been determined for instance, with respect to deeds which have no date, or a void or impossible date, and the term has been limited to commence from the date, that the delivery of the deed should be considered as the date, for the purpose of fixing the commencement of the term. If, however, the particular time seems to be an essential part of the agreement, the court cannot supply the defect, and the lease consequently must be void for such uncertainty. (b) Where also a lease was made to begin from the feast of the Virgin Mary, without stating, in certainty, whether the Feast of the Annunciation or Purification was intended; such an uncertainty was considered as incapable of remedy. (c)

It was ruled in a case (d) at Nisi Prius, that where the holding which may be presumed to be by parol, (e) is from Michaelmas generally, the custom of the county as to whether new or old Michaelmas was meant is admissible in evidence. But if such a demise is by deed, parol evidence is not admissible. Therefore, in another case in K. B. it was decided that since the alteration of the stile, the feast of St. Michael generally means new Michaelmas, unless there is some reference in the deed to a prior holding from Old Michaelmas; and it was further held that no evidence was admissible to shew the parties meant Old Michaelmas. (f)

Where leases have a good date, and the *habendum* does not specify the time at which the lease is to commence, or the *habendum* is from the making, or from the sealing of the deed, or from henceforth, these take effect from the delivery; for before delivery the lease is no deed at all; and, therefore, from the making or from

(a) 1 Rep. 155. Liffey v. Whitney, Dy. 272. a.

(z) Clarke v. Sydenham, Yelv. 85.

(b) Anon. 1 Mod. 180.

(c) 1 Leon. 227. Bac. Abr. Lease, I. 1.

(d) Farley d. Corporation of Can-

terbury v. Wood, 1 Esp. N. P. C. 197.

(e) See 1 Phill. Ev. 584. The report does not state the fact

(f) Doe d. Hall v. Benson, 4 B. & A. 588. Doe d. Spicer v. Lee, 11 East. 312.

henceforth relate to the delivery. In all such cases the day of the delivery is taken inclusively. (g)

Formerly a doubt frequently was agitated as to the construction of the words "from the date" and "from the day of the date;" the former being considered inclusive of the day of the date, and the latter exclusive: so that where the tenant of a particular estate, with a leasing power, was expressly restrained by the nature of his power from making reversionary leases, this trifling distinction was the instrument frequently of great injustice to an innocent lessee. The whole difficulty arose from the different meanings attached to the word "*date*." When taken strictly, it means the act of the delivery of the deed: but in common parlance it means the day of the date. Those who used the two expressions evidently thought them synonymous: but, by a very precise and technical construction, leases from the day of the date were held to be reversionary leases, because in consideration of law a day is an indivisible point; and it is the principle of our law to exclude the whole day of an act done, or an event happening. (h) But this question has been set at rest by the case of *Pugh v. The Duke of Leeds*, (i) in which the court determined that "from the date" and "from the day of the date" mean the same thing, and are both to be construed inclusive of the day of the date.

In the demise of a reversionary interest, if the lessor recites a lease which afterwards appears to be void, or a lease is recited which does not exist, and the new lease is limited to commence after the recited lease, this second lease shall commence presently, because in the judgment of law a void limitation and no limitation are all one. In these cases the commencement being referred to a thing not in existence, cannot be governed by it; and, therefore, it is as if there was no recital, which would leave the lease to begin presently as the strongest construction against the grantor. (k)

So if the lessor misrecite a good lease in a point which is material, such as the date, the new lease is held to commence immediately; although, as long as the old lease continues, the second

(g) Co. Litt. 46.

(h) *Lester v. Garland*, 15 Ves. 248.

And *Cook v. Darbison*, Carth. 289.

(i) Cowp. 714.

(k) Bro. tit. Lease, 62. *Miller v.*

Mainwaring, Cro. Car. 399. *Bassett*

v. Lewis, 1 Lev. 77. Dy. 261. b. pl.

28.

can only commence in computation of time, and not in interest. In cases, however, of mis-recital, if the reference to the estate of the first lessee is general and not to any specific lease, as it is recited, such a mis-recital is immaterial; and the second lease will not commence, either in computation of time or in interest, till the expiration of the former. (*l*)

The recital of a lease is no evidence of its existence; therefore, if the jury, on a special verdict, find the indenture containing the recital, but do not find the lease which is recited, it seems that the court will intend that there is no such lease; and the second lease, if made to commence after the recited lease, will commence immediately, as it would if no prior lease had existed. (*m*)

It has been seen that the commencement of a lease for years in point of time may precede its commencement in interest. The antedating it, therefore, affects it with no uncertainty. Where, therefore, a lease was made *habendum* from the Annunciation last past for the term of twenty-one years next ensuing the date hereof, it was held that the lease commenced in computation of time from the Annunciation, although it commenced in interest only, from the delivery of the indenture. (*n*) So a lease to hold from a day past for fifty-years, thence next ensuing, the said term to commence after the surrender, forfeiture, or other determination of an existing lease of the same premises, was considered sufficiently certain in its commencement; although in computation of time it commenced previous to its commencement in interest. (*o*)

Where a lease was made of black-acre for ten years, and another lease was made of white-acre for twenty years, and afterwards a lease was made of both for forty years, *habendum* after the end of the said several demises for ten years and twenty years: it was held the new lease might have several commencements *reddendo singula singulis*. (*p*)

(*l*) Mount v. Hodgkin, Dy. 116. a. Halswell v. Aylsworth, 2 Roll. Abr. 55. Foot v. Berkeley, 1 Lev. 234. 1 And. 3. Rowe v. Huntington, Vaugh. 73. 80.

(*m*) Rowe v. Huntington, Vaugh. 80. Palmer's case, 4 Rep. 74. Darcett's case, 1 Roll. Abr. 849. Elme v. Leaves, *ibid.* 850.

(*n*) Moor v. Musgrave, Bridgm. 98. Mayn v. Beak, Cro. Eliz. 515. Rutter v. Mills, Cro. Eliz. 662. Martin v. Wentworth, Noy. 1.

(*o*) Enys v. Donithorne, 2 Burr. 1192.

(*p*) Justice Windham's case, 5 Rep. 7. Wrotesley v. Adams, Plow. 198. Veal v. Roberts, Cro. Eliz. 199.

A prior and convent in 1 Hen. VIII. made a lease for three lives, and afterwards made another lease of the same lands for years to another person, and then made a concurrent lease to a third. Queen Elizabeth reciting the lease for three lives, and also that two lives were expired, granted a lease for years after the expiration of the third life, or whenever the lands should by any means come into the hands of the crown. Hale, C. B. thought that if all the preceding leases had been correctly recited, the lessee would have had his election whether the lease should commence after the estate for life or years: but the case was not adjudged. (q)

Many other cases might be enumerated: but it is unnecessary to state them at length as they do not establish any new principle. The general rule to be deduced from all is to give effect to all the words of a deed consistently with the intention of the parties; with this correction, however, in the grants of private persons that the grant shall be taken most strongly against the grantor. (r)

Where land is demise by copy for three lives, and then a lease of the freehold is made for years, *habendum* after the death, forfeiture, or other determination of the copyhold estates; the estate for years does not commence till after the widow's freebench, if she be entitled to it by the custom, since in effect the freebench is part of the copyhold estate. (s)

Where (t) a lease had been made for sixty years, with a proviso for re-entry if the lessee should die within the term, and then a second lease was made for sixty years, to commence when the possession should become vacant by death, surrender, or otherwise: it was held that this lease could not commence upon the death of the lessee within the term, because the possession could not become vacant without a re-entry; but it would at all events take effect after the expiration or effluxion of time, unless it commenced before upon the surrender of the former lease, or upon the re-entry of the lessor after the lessee's death within the term: neither was there any election given to the lessee to consider it as commencing at one time more than another.

(q) *Apsice v. Hayes*, Hard. 498.

Bridg. 100.

(r) See *The College of Manchester v. Trafford*, 2 Lev. 241. 2 Show. 31. *Scaman's case*, Godb. 166. Dy. 261. b. in marg. *Newsham v. Carew*,

(s) *Clark v. Candle*, 2 Sid. 165. 1 Lev. 20. but not adjudged.

(t) *The Bishop of Bath's case*, 6 Rep. 34.

Where (u) a lease for years was made to commence after the surrender of a prior lease, Wray, C. J. held that if the lessor accepted a surrender from the first lessee without giving notice to the second, the surrender should not be prejudicial to the second. This, however, is on the supposition of collusion between the lessor and the first lessee: but if there is no collusion nor fair excuse for the second lessee's not taking notice of the surrender, it seems reasonable that the second lease should commence from that time, although no formal notice should be given by the lessor.

By the stat. 19 Charles II. c. 6. (x) it is enacted that any person for whose life or for any term of years determinable on his life, an estate shall have been granted, shall remain beyond seas or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient or evident proof be made of the lives of such persons in any action commenced for the recovery of such tenements demised by the lessor or reversioner, the person or persons on whose life or lives such estate depends shall be accounted naturally dead. A power is given to challenge jurors upon the exception that the greatest part of their real estate is held by lease or copy for lives. And a proviso is added, that if after eviction the person on whose life the estate depended should return from beyond sea, or should be proved to be living, the tenants may re-enter and hold the lands for their former estate, and may recover for damages against the persons who received the profits since the eviction the full profits with lawful interest, from the time they were ousted, as well in the case where the persons on whose lives the estate depended shall be dead at the time of bringing the action as if such persons had been living.

In *Doe d. George v. Jesson* (y) it was held that the presumption of the duration of life of such persons ended at the expiration of seven years from the last time they were known to be living; and in a later case (z) the fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, though not a member of the family, was considered *prima facie* evidence of his death. In a case (a) before Lord Holt, he

(u) *Gurney v. Sacr*, 3 Leon. 95.

and A. 433.

(x) Irish Statute, 7 Wm. III. c. 3.

(a) *Holman v. Exton*, Carth. 246.

(y) 6 East. 85.

1 Vin. Abr. 112.

(z) *Doe d. Lloyd v. Beakin*, 4 B.

ruled at *Nisi Prius* that where a lease was made in reversion, to commence after the deaths of lessees in possession for a similar term, if they so long lived, the lessees in reversion were reversioners within the statutes.

In a very late case (*b*) where it appeared that a lessee for years, determinable on lives, had paid an advanced rent during a dispute whether the last *cestui que vie*, who had been absent for many years from the kingdom, was alive, the Court of Chancery granted a commission to examine witnesses to prove that the *cestui que vie* was still living, upon the terms of the lessee (the plaintiff) paying into court the arrears and accruing payments of the advanced rent which he had been accustomed to pay. This case, the Lord Chancellor observed, presented the peculiarity that at a particular period, when the parties differed on the fact, whether the *cestui que vie* was living or dead, they came to an agreement by which the rent was raised from twenty shillings to twenty guineas; and at a subsequent period from twenty guineas to forty-two pounds. If the *cestui que* was alive, in justice the estate ought to have been held at the rent reserved: but a difficulty in recovering the amount paid beyond that rent would be created by the dispute whether he was living, and it seemed fair that the plaintiff should continue to pay the 42*l.* which he had been accustomed to pay without prejudice to the question whether he should be relieved against so much of the payment as was additional to the rent reserved.

By the stat. 6 Ann. c. 18. (*c*) it is provided, that any person having any claim or demand in remainder, reversion, or expectancy to any estate after the death of any person within age married woman or other person whatsoever, on affidavit made in the Court of Chancery, that he hath cause to believe that such minor married woman or other person is dead, and that the death is concealed by the guardian, husband, or other person, may once a year move the lord chancellor to order (who is authorised and required to order) the guardian, trustee, or other person concealing, or suspected of concealing (the death of) such person, at such time and place as the court shall direct, to shew to such person or persons, not exceeding two, as shall be named in such order by the party prosecuting it, such minor married woman or other person aforesaid. In case of neglect, the court may order the person

(*b*) *Brown v. Petre*, 2 Swanst. 235.

(*c*) Qu. Irish Statute.

to be produced to the court, or to commissioners, two of whom shall be named by the person prosecuting the order; and in case of non-production, the minor married woman, or other person so concealed, shall be taken to be dead; and it shall be lawful for the person entitled in remainder, &c. to enter. Provision is also made for producing persons beyond seas to others appointed for that purpose; and for re-entry and recovering the intermediate profits in case of the person on whose life the estate is holden afterwards appearing. If the person required to produce the other make it appear that he has used his best endeavours to do so, and that he cannot compel the party to appear, and that such party is living, he may continue in possession. Upon this statute Sir W. D. Evans observes, that it does not appear to have ever been acted upon; and that in general a bill of discovery is a more convenient remedy. *Ex parte Grant (d)* appears to be a solitary exception to Sir W. D. Evans's observation, in which the lord chancellor made an order according to the statute.

A lease for years or for life may become void upon any collateral condition or contingency which the parties may agree upon. In the case of terms for years this uncertainty of their probable duration is not inconsistent with their nature, if in other respects during their existence they may be considered as independent estates for years. An uncertainty of this kind is contained in the word *term* as distinguished from a fixed period of years. Therefore the commencement of a lease, limited to commence after the expiration of a former lease, may be accelerated by the surrender, forfeiture, or extinguishment, of the interest of a prior lessee. (e)

A lease for life may be made determinable upon any collateral event. So a lease for years may be made determinable even upon lives, although a lease for years in terms cannot be made for so many years as any person shall live. The reason is, that in the latter case it cannot be distinguished from an estate for life: but in the former the lives are collateral to the estate for years; and in the mean time the lease is for an absolute term to all intents and purposes. (f)

If a lease be made for years if C. so long live, and C. is dead

(d) 6 Ves. 512.

(f) Co. Litt. 45. b. 1 Roll. Abr.

(e) *Wrotesley v. Adams*, Dy. 177. b. 846. 1 Brownl. 125.

at the time: this is a lease for so many years absolute, as the strongest construction against the grantor. (g) But where (h) a demise was made for twenty-one years to A. and B., and if they should die within the term, then to D. in the same manner and form as to A. and B., D.'s term was held to be determined by the death of D.

Where a term for years is made to two persons, if they so long live, or to one for years determinable on the life of two or more others, the life of the survivor is not implied; and therefore, if the lease be intended to extend to the life of the survivor, it must be so expressed. The law, as has been already mentioned, makes the life of the survivor a parcel of the estate in freehold leases, and therefore the mention of the life of the survivor is superfluous: but an estate for years determinable on lives is merely a conditional estate, to which the law attaches no incidents distinct from other estates for years. The condition, therefore, partakes of the nature of all collateral conditions, and cannot have an implied as well as express meaning. The express meaning in this case is that all the *cestuis que vies* should be living during the continuance of the lease; and although in common language the life of the survivor is implied, the law construes that to be a severance of the entirety of the condition. So in freehold leases, a condition that a lease for life shall continue as long as A. and B. dwell in Norfolk, or are justices of the peace, being merely collateral, the failure of one living in Norfolk, or continuing a justice of the peace, will in the same way put an end to the lease. (i)

If, however, one joint-tenant lease his share for years, if he and his companion so long live, the circumstance of the joint-tenancy will support the condition; and the lease will not determine on the death of one, because these words are no more than the law would have implied if they had not been expressed. But if the lessor's companion surrenders his part, or they make partition, then the lease will stand singly on the life of the grantor; because the interest which was given them and their lessees in the life of each other is gone by the severance; and the condition is not satisfied by the death of the other joint-tenant in the life of the lessor,

(g) Jenkins's Cent. 305.

(h) Henning v. Blake, 2 And. 17.

(i) Brudenell's case, 5 Rep. 9. Plow.

422. a. Hughes v. Crowther, 13 Rep.

66. Daniel v. Waddington, Cro. Jac.

378. Bailes v. Wenman, 1 Ventr. 74.

Wilkinson's case, Helt. 76.

because the law never implies any thing to the prejudice of the lessee. (k)

So where (l) a lease was made for years, if A., his wife, or any of their issue should so long live, the use of the disjunctive "or" distinguished it from the other cases: but it was admitted, that if the words had been, if A. and his wife and their issue should so long live, all their lives jointly would have been a measure of the estate; and by the death of one it would have been determined.

Where (m) there was an *habendum* limiting an estate to two jointly for a certain number of years, a proviso that the term should cease, if the lessees died within it, was likewise held to admit of a greater latitude of construction. The lease at first being general and absolute, was supposed to give them a joint tenancy in the term; and then the proviso which came after, though it was held to prevent the term from going to the executors of the survivor, did not terminate the lease before the death of both.

Where (n) a lease was made for years, if the lessee so long lived and continued in the lessor's service; it was held that the lease did not determine by the death of the lessee within the term, because the act of God rendered it impossible that the lessee should serve any longer. The court indeed were not unanimous: but the case has been recently mentioned without disapprobation by Lord Ellenborough, C. J. (o) So where (p) a lease was made to a feme widow for a term of years, *si tamdiu vixerit vidua et inhabitaret super præmissa*; and she died within the term, without having married again; the term was held not to have determined, because the condition was become impossible by the act of God as it seems; for if it had been a limitation for years *si tamdiu vixerit vidua*, there the estate would have determined on her death; because it might be intended that it was a provision for her life, subject only to a previous determination in case she married: but here the latter clause that she should dwell on the premises excluded the supposition that the lease was made for her jointure only.

(k) Daniell v. Waddington, Cro. Jac. 378. Harbin v. Loby, Noy. 157.

See Sheph. T. 110. *contra*.

(l) Baldwin v. Cook, Moor. 289.

(m) Dy. 67.

(n) Wrenford v. Gyles, Cro. Eliz.

643.

(o) See 6 East. 534.

(p) Sawyer v. Hardy, Moor. 400.

In the case of *Doe d. Bromfield v. Smith*, (g) which has been already mentioned under the head "agreements," Mary Bromfield agreed to let her house to B. during her life, supposing it to be occupied by B., or a tenant agreeable to A. B. occupied during his life; and the question was whether any interest survived to his executor, against whom an ejectment was brought, so as to entitle her to a notice to quit. The court having determined the instrument to be an agreement, and not a lease,—Lord Ellenborough, C. J. said "The first material words are, that the agree- is to continue 'during my life.' The term therefore could in no event exceed Mrs. Bromfield's life. Then it goes on 'supposing it to be occupied by himself, or a tenant agreeable to me,' those I consider as words of condition requiring B. either personally to occupy the premises, or that he should occupy them by some other tenant agreeable to her; still regarding it however as in effect the occupation of B. himself. His interest therefore ended with his life; and as he continued in possession to the last upon the terms of the agreement, we cannot refer his possession to any other title, and consequently the ejectment was well brought upon his death, without giving his executor notice to quit. If any interest had survived to her, the case would have been open to another consideration: but no interest vested in her." The rest of the court were of the same opinion. But Le Blanc J. seemed to attach some weight to the circumstance, that the agreement was only to let to B. without saying his executors. The learned judge perhaps did not recollect, that the agreement was to grant a freehold lease; in which case it would not naturally occur how the interest would be disposed of after B.'s death, if any such interest should survive. But supposing that the lease was a chattel lease for argument's sake, the clause as to personal occupation would undoubtedly have appeared to be repugnant: but whatever difference such a circumstance would have made, if the word "executors" had been used, perhaps it is carrying the doctrine too far in the case of mere agreements to infer any thing from its omission, when such words as heirs, executors, administrators, and assigns, are so universally considered as included in the grantee's own person, (r) if from other circumstances the grant is considered extensive enough to carry an interest trans-

(g) 6 East. 530.

258. 264. But see *Williams v. Cheney*,(r) See *Weatherall v. Geering*, 12 3 Ves. 50.Ves. 504. *Church v. Brown*, 15 Ves.

missible to representatives. Sir W. D. Evans observes, that this position of the learned judge cannot be acceded to without very serious and extensive consequences: for that it is perfectly unusual in executory agreements, especially where they are made, as is commonly the case, without professional assistance, to mention the words, the omission of which was supposed by Mr. J. Le Blanc to limit the extent of the interest demised. And, even in contracts for the purchase of an estate of inheritance, it is very seldom that the intention of conveying the property to the purchaser and his heirs is particularly expressed. The insertion moreover of the words "executors and administrators," even in perfect instruments of assurance, is very seldom requisite in respect of their legal operation, however customary as matter of technical form. In the case of an actual demise to W. S. for the life of A. B. with no particular circumstances to indicate an intention that it should determine upon the death of W. S., it is perfectly clear that the executors would be entitled to hold, and by the statute of frauds be substituted in the place of general occupants; and it is repugnant to suppose that the construction of a preparatory agreement should be affected by the non-insertion of terms, the omission of which would not vary the effect of a more perfect assurance. It may also be observed that the reasoning of Lord Ellenborough, as reported, should be viewed with some caution in conformity to the very important observations of Sir W. D. Evans given in a former page. "His interest, (*i. e.* B.'s interest) therefore," observed his lordship, "ended with his life; and as he continued in possession to the last upon the terms of the agreement, we cannot refer his possession to any other title." These words seem to convey the notion, that the accidental circumstance of the tenants continuing in possession, according to the sense of the words of the agreement, should have a retrospective operation in interpreting the meaning of the parties at the time of entering into the agreement; which seems clearly to militate against every sound rule of interpreting the intention of agreements.

Although care must be taken that the limitation of a lease for years shall not amount to a lease at will only; yet there is no objection to a proviso that after a certain period of years the lessor or lessee, or both, may have the option of determining the lease before the whole period originally fixed has elapsed. Leases accordingly are frequently made for 21 years determinable at the

option of the parties at the end of seven, fourteen, or any other interval of years. (s) Reasonable notice must be given before the expiration of each period of the intention to determine the tenancy. (t)

If there is no provision to determine the lease at the will of either party, and the lease is in the alternative for seven, fourteen, or twenty-one years, the lessee may take the term which is most beneficial to himself, and the lessee alone has the option of determining the lease at the end of these periods. (u)

In some cases six months' notice is specifically stipulated for: but where (x) a lease was made for seven years, with a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' notice; and that after the expiration of such notice upon payment of all rents and duties to be paid by the lessee and performance of all covenants the lease should be void; it was held that mere notice was not sufficient, but that the performance of the covenants in the lease was a condition precedent to the determination of the lease.

In a late case, (y) in the lease of coal-mines which reserved a royalty rent for every ton of coals raised, and contained a proviso, that the lease should be void to all intents and purposes, if the tenant should cease working at any time for two years; after the working had ceased more than two years, the lessor received rent, and then brought ejectment; it was held that a tenancy from year to year was not created, because the court said the cesser to work was a wrongful act; and therefore, although the proviso was in terms absolute and unqualified, to permit this construction on the part of the tenant would be to give him the advantage of his own wrong. The lease was therefore considered as voidable only at the option of the lessor, and consequently that the lessor might avoid the lease upon any cesser to work commencing two years before the day of the demise in the ejectment.

VII. The term "reservation" in leases is usually applied to the mode in which some right, privilege, or benefit, is secured to the

(s) *Ferguson v. Cornish*, 2 Burr. 1032. See 3 T. R. 463.

(t) *Goodright d. Hall v. Richardson*, 3 T. R. 463.

(u) *Dann v. Spurrier*, 3 B. and P.

399. *Doe d. Webb v. Dixon*, 9 East. 15. *Price v. Dyer*, 17 Ves. 356.

(x) *Porter v. Shepherd*, 6 T. R. 683.

(y) *Doe d. Bryan v. Banks*, 4 B. and A. 401.

lessor, which had no separate existence before the making of the lease. Thus easements and other incorporeal rights, being merely manifestations of possessory right, have no more a separate existence from the possession than personal rights have independently of the enjoyment of personal liberty. If the lessor therefore chooses to retain to himself any right of way, or other privilege affecting the complete possession of the land demised, it is called a reservation. It is perfectly competent for him to do so; and the same rules will apply to such reservations, as to grants of similar easements over land not comprised in the lease.

Reservations, however, between landlord and tenant usually signify a stipulation for the render of rent, or other services to the landlord as a compensation for the enjoyment of the land demised. There are two kinds of reservations which are thus made on leases, rents, and heriots, both of which are called services; because they are in lieu of corporeal services, which in ancient times was the only mode of remunerating the landlord.

Rent service, observes Littleton, (s) is where tenant holds of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other services and certain rent: so that the essential property of rent service is, that it should be certain both in quantity and times of payment. It is the nature however of heriot service to be uncertain both in value and the time of payment. A heriot has been described nearly in the same words, both by Bracton (a) and Fleta; (b) viz. *ubi tenens liber vel servus in morte sua respicit dominum suum de quo tenuerit de meliori averio suo vel de secundo meliori averio suo secundum consuetudinem locorum, quæ quidem præstatio magis fit de gratia quam de jure et quæ hæreditatem non contingit*. Which description plainly points at the two species of heriots; namely, heriot service which the free tenant paid, and heriot custom paid by copyholders whose tenure is derived from villenage. The expression "*quæ hæreditatem non contingit*" relates merely to the distinction between such services and reliefs, and other incidents implied by the feudal law in cases of descent, as an acknowledgment of superiority. Heriot service therefore, in its more common sense, is a service incident to ancient tenure upon a grant in fee simple created before the statute of *quis emptores* :

(s) Litt. s. 213.

(b) Fleta, lib. 3. c. 18.

(a) Bract. lib. 2. fol. 86. a.

but it may be reserved likewise on a lease for lives or years, or for years determinable on lives. In all respects, except its uncertainty, a heriot is of the nature of other services.

Rendering, reserving, yielding, and paying, are said to be the most appropriate words of reservation: but any words clearly shewing the intention of the parties are sufficient for that purpose. Where (c) a lessee therefore covenanted to pay a certain sum *per annum*, it was held a good reservation of rent: but where there was a reservation of rent, and the lessee further covenanted to pay two capons, the latter payment was considered only in covenant, because the intention appeared to be to keep it distinct from the payment of rent. (d)

At the common law no rent could be reserved on a bargain and sale of land, because nothing passed but an use; and no rent could issue out of a use: but now, by the express saving of the statute of uses, a rent may be so reserved. (e)

Since it is the essential property of rent to be certain, the quantity of the rent must be mentioned; or it must be so reserved that, by reference to something else, it may be reduced to certainty. Under this head various cases have occurred on the interpretation of different instruments, which it is not necessary to state at length, as they establish no new principle, but depend on their own circumstances: (f) but it should be recollected that no evidence is admissible to prove any additional rent payable beyond that expressed in the lease or written agreement, any more than for the purpose of varying the quantity of the estate, or with respect to collateral matters of which nothing has been said. (g) So also if there be any subsequent agreement for the abatement of the rent of lands, it is within the statute of frauds, and must consequently be in writing, and signed as directed by that act. (h) If the lease is under seal, the writing making the abatement must likewise be by deed; because it operates as the release of an instrument under seal.

(c) *Harrington v. Wyse*, Moor. 459. 595.

Vin. Abr. Reserv. l. pl. 5. Anon. 12 Mod. 73. Dennis v. Henning, Ow. 151. *Athowe v. Heming*, 1 Roll. Rep. 80.

(d) *Drake v. Munday*, Cro. Car. 207. 72.

(e) *Wykes v. Tyllerd*, Cro. Eliz.

(f) *Coker v. Guy*, 2 Bos. and Pul. 565. *Gerrard v. Clifton*, 7 T. R. 676. *Clifton v. Walmsley*, 5 T. R. 564.

Birch v. Stephenson, 3 Taunt. 469.

(g) *Preston v. Merceau*, 2 Bl. 1249.

(h) 1 Scho. and Lefr. 306.

Where several things are comprised in one lease, the reservation may be either entire or several: in the latter case each parcel will be liable only to its own rent. *(i)* But no difference of tenure, by which several lands comprised in the same lease are held, will create a severance of the rent; therefore where *(k)* freehold and copyhold lands were let at an entire reservation, it was held that the rent issued out of the entire land, copyhold and freehold.

At the present day the rent is usually reserved in money: and even where a corn rent is reserved, it must be understood to mean not a payment in kind, but the value of the corn at the market price at the time limited for payment. *(l)*

In the case of leases of mines it is not unusual to reserve as rent a certain share of the produce of the mine when raised; *(m)* that is, not a portion of the ore or mineral in its natural state, for that might operate as an exception, but of the produce of the mine, after it has undergone the operation of smelting, or any other process of separating the pure ore from the different substances with which it is combined in its natural state. *(n)* The distinction may appear immaterial: but in a collateral point of view, namely, its rateability to the relief of the poor, in the hands of the landlord, it is of considerable importance. Rent is not rateable, because the stat. 43 Eliz. affects the occupiers of land only: and, therefore, if the actual occupier be rated, to subject the rent to the rate would be a double rate upon the same land.

The statute 32 Hen. VIII. c. 28. and the restrictive statutes of Eliz. relating to ecclesiastical persons, and in conformity to these the usual powers under private settlements, require that what is called the accustomed rent should be reserved, or grants made under such statutes or powers. The statute of 32 Hen. VIII. is express that a rent must be reserved: and, moreover, that the rent reserved must be the same or more in quantity than has been reserved within the twenty years next before the making of the lease.

With respect to ecclesiastical persons, the course of leasing under the statutes having been usually of long standing, little

(i) Tanfield v. Rogers, Cro. Eliz. 341.

(k) Collins v. Harding, Cro. Eliz. 606. 622.

(l) 4 Leon. 46. pl. 122.

(m) Campbell v. Leach, Ambl. 740.

(n) Rex v. The Earl of Pomfret; 5 M. and S. 139.

difficulty can arise : if there has been an uninterrupted series of leases according to the provisions of those statutes, the ancient rent can never be less than the rent reserved upon the first of such leases made after their enactment, this being fixed as the measure immediately after the passing of the act. If the rent on any new lease is increased, it will likewise follow that it can never be diminished upon any subsequent lease made by virtue of the statute. (o)

Where lands have been recently entailed, or where husbands are seised of estates of inheritance in right of their wives, the construction of the words of the statute does not appear to be so obvious. Where for instance, previous to making the lease, several rents, some greater and some less, have been reserved during the twenty years, previous to making the lease, whether the first or the last rent should be considered the accustomed rent has admitted of some difference of opinion : and the same difficulty arises under powers which are modelled according to the statute. Lord Hale (p) and Lord Holt (q) were of opinion, that if various rents had been reserved during the twenty years previous to the lease, the last should be considered the accustomed rent, because the intention was that the land should not be in a worse condition than at the time of making the lease or settlement. In *Orby v. Lord Mohun* (r) Lord Cowper, then lord chancellor, and Trevor, C. J. made a doubt of this construction of the words "ancient and accustomed rent." Their construction seems to turn upon the priority of the rent, so that if the land had been leased two or three times within twenty years, and various sums had been reserved, the first rent ought to be the measure of the rent to be reserved. It appears, however, that Lord Cowper thought it probable that the first rent would be the greatest : for he said that the two last might have been reserved by a tenant in fee, who is not obliged to reserve the ancient or any other rent ; so that if it happens that the first rent is less than the others, Lord Cowper's rule falls to the ground : but it is possible that Lord Cowper's meaning might have been that the greatest rent reserved during those twenty years should be considered the ancient

(o) 2 Vern. 543.

(q) *Orby v. Lord Mohun*, Prec. in

(p) *Morris v. Antrobus*, Hard. 325. Ch. 257.

(r) Prec. in Ch. 257.

rent as being most for the advantage of the remainderman. The point, however, now is not of much importance, since no powers are so framed in modern times. Where such terms are introduced the better opinion, according to Mr. Sugden, is that, as a general rule, the rent reserved at the time of the creation of the power where a lease was then in being, or the lease before it where no lease was then in being, is the lease to which the power refers. (s)

If not only a yearly rent, but things not annual, such as heriots, have been formerly reserved, or any fine or other profit upon the death of the farmer has been usually paid, the omission of these in any new lease is not material, if the yearly rent is reserved. (t) So where (u) a chanter of St. Paul's being seised of a parsonage *jure cantuariæ* leased a portion of tithes for two years, rendering *8l. per annum*, and reserving pasturage for a colt in the land of the lessee, and the lease being expired, his successor made a lease for twenty-one years of the said portion of tithes, rendering *8l. per annum*, but omitted the running of the colt: yet the lease was held good, because it was a thing reserved out of the lands of the first lessee only, which the successor could not reserve, such first lessee not being his lessee of the tithes.

In the case of *Morrice v. Antrobus* (v) a precentor of St. Paul's made a lease of lands, the antient rent whereof was 40*l.* and a couple of capons; and he now reserved only 40*l.* and took a covenant from the lessee to pay yearly over and above the 40*l.* a couple of capons or 6*s.* 8*d.*; and yet this was held a sufficient reservation to bind the successor. The case, however, was decided on another point; namely, that as the lease was made with baron and feme, and the baron alone covenanted, which would not bind the wife surviving, the lease could not be good against the successor.

Whether the best rent is reserved is a point to be decided by a jury, and the *onus probandi* lies on the party impeaching the lease. (x) The great point, in the case cited, related to the species of evidence which was admissible on this head. It ap-

(s) Sugd. Pow. 610. 3d. edit. see post.

(t) Dean and Chapter of Worcester's case, 6 Rep. 37. Banks v. Brown, Noy. 110.

(u) Eusden v. Dennis, Palm. 106.

(v) Hardr. 325.

(x) Roe d. Prideaux Brune v. Rawlings, 7 East. 287.

peared that there had been several tenants for life under a settlement with similar leasing powers. The evidence in question was a letter received by a tenant for life, prior to the tenant for life, who exercised the power by granting the lease impeached. This letter was from a confidential agent, and contained a minute account of the tenants and rents of the estate ; and this paper had been continued by the successive owners of the estate amongst their muniments. The question was, whether as against the tenant for life exercising the power, (who had preserved the paper and transmitted it) or any other person claiming under the power, this paper was not evidence of the ancient rent. Lord Ellenborough, C. J. in delivering the opinion of the court said, the contents of this paper were adverse to the title of the person who had possession of it; it diminished his interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time ; but certainly, as the contents shewed, by one who had an intimate knowledge of it : and it was in some degree recognised as authentic by the then owner of the estate, the tenant for life, by this indorsement upon it, " From Hobart, a particular of my estate in Cornwall," thereby importing that the writer bore the degree of relation to the estates and their owner, which he purports to do on the face of the paper, and that the owner considered the paper as an actual particular of his estates. "The question then is, whether this declaration of the tenant for life, so circumstanced (for it is to be considered only as a declaration by him,) as to the existing rent of the tenant in question, be evidence of that fact against a succeeding tenant for life of the estate, having a similar limited power of leasing, reserving the ancient rent, who claims as a purchaser : for if he had derived title from the former tenant for life, by whom the indorsement was made, the case would have been quite clear. And we think it is also evidence against the defendant, who claims from a succeeding tenant for life. It appears that the former tenant for life, by whom the paper was thus accredited, was not only disinterested in respect of the particular fact of the then existing rent, but that he had an interest the other way to diminish the amount of it. Then at this distance of time, with the means of knowledge which he had of the fact, and his interest declaring it the other way,

we think that his declaration is evidence of the fact to go to the jury." In another part of the same judgment, Lord Ellenborough adds, "Now this paper might, if it had met the eye, have been used adversely to the former tenant for life, by whom it was authenticated; but could not have been used in his favour: he could not, therefore, have had any undue motive in preserving it." Upon the same grounds, the court thought that the entries in the book, of the former tenant for life, of the receipt of rent by the same person were also evidence of the fact which ought to have been submitted to the jury.

Improvements by the tenant, however valuable, will not authorise a lease at an undervalue where the rent to be reserved should be the best rent; and if a fine be taken, the lease cannot be supported, because it is evident that, however considerable the rent, it might have been increased if the fine had not been taken. In *Shannon v. Bradstreet*, (y) however, the tenant having covenanted to lay out 200*l.* in improvements, Lord Redesdale did not think that circumstance alone sufficient to avoid the contract, although it was argued that this covenant was equivalent to a fine. Lord Redesdale, in this case, laid some stress upon the circumstance of there being no evidence of fraud or collusion between the lessee and tenant for life: but Mr. Sugden justly questions this principle. The simple question, in these cases, is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction. Thus far Mr. Sugden seems to have been right: but when he says that it should seem that, although the rent reserved be the *full value of the land*, yet, if satisfactory evidence could be produced to a jury, that a tenant was willing to give an additional rent in lieu of the money agreed to be laid out in improvements, the lease could not be supported; his own doctrine requires as much caution in its application, as he considers necessary in the case alluded to before Lord Redesdale. Where there is a power to lease at the best rent, if the transaction is fair and no fine or other collateral consideration is taken by the tenant for life leasing under the power, or any injurious partiality shewn by him in favour of a particular lessee; it has been held that the lease cannot be set aside merely on the ground that the rent accepted was not the highest offered at the time of making the lease, because in the

(y) 1 Sch. and Lefr. 52.

choice of a tenant many things are to be considered besides the amount of the rent which would give a preference to one tenant over another who had offered a higher rent. (1)

In a case referred to a master in chancery (a) the master reported in the following manner: But as to the said lease No. 2. whereby not only the honour of Gloucester, but likewise sixteen several manors in Northamptonshire, and more particularly the manor of Boughton, and a great walk, and Boughton Park, with the deer therein, together with other lands in Northampton, and also the manor of Beaulieu in the county of Southampton, were demised to A. for twenty-one years absolute, at the yearly rent of 600*l*. (under a power to lease at rack rent,) the said master did conceive from the general, extensive, casual and uncertain natures and values of the greater part, at least, of the premises, and the great difficulty, if not utter impossibility, arising from thence of forming any judgment whether the rent thereby reserved was the utmost and best improved yearly rent, which at the time of making such lease could or might have been reasonably gotten for all the premises, and the rather as there was no exception of Boughton House, &c. which were expressly excepted out of the said power of leasing; for the said reasons he did conceive that the lease No. 2. was not a valid lease, nor warranted by the power. This part of the master's report was acquiesced in. Mr. Sugden has rather hastily admitted this opinion of the master into the text as an authority: but in the note he adds that the point was a question for the jury. The lease in question, it may be observed, was vitiated by including lands expressly excepted out of the power: but there seems no ground from experience in acquiescing with the master's report, in supposing that property of the nature described was incapable of being properly estimated by a jury.

In a late case (b) it was held that part of the premises, formerly demised, jointly with others at one entire rent, might be leased under a power at a rent bearing the same proportion to the old rent as that part of the premises bore to the whole formerly demised.

As to the restriction from taking a fine, it is said by Mr. Sugden (c) to have been doubted in practice whether a new lease

(1) Doe d. Lawton v. Radcliffe, 10 East. 278.

(b) Doe d. Lord Shrewsbury v. Wilson, 5 B. and A. 363.

(a) The Earl of Cardigan v. Montague, Sugd. Pow. App. 10. 2.

(c) Sugd. Pow. 603. 3d. edit.

granted upon the surrender of the old one at an increased rent is valid. The increased rent, it has been argued, is equivalent to taking a fine at the expense of the remainderman; for if the old lease had been permitted to run out, a larger rent might have been obtained. But there is not, he adds, much weight in this argument; and he refers generally to *Wilson v. Sewell*, (d) (respecting leases by the master of the rolls:) but the point was certainly not adverted to in that case; and the power given by the particular act of parliament upon which it turned was not to leases reserving the best rent, and contained no restriction as to fines. Sir W. D. Evans thinks, however, that there is considerable weight in the objection; and, at any rate, in the shape of evidence it might furnish matter for a very important question to a jury, whether the rent was the best which could be gotten from a tenant not making a previous sacrifice to obtain the lease.

In *Isherwood v. Oldknow*, (e) the rent was made to commence from a day previous to the commencement of the lease, which was objected to as amounting to a fine. The court disallowed the objection, as it appeared that there had been an occupation from the time from which the rent was appointed to commence: but the court thought that the fact that there had not been such an occupation might have been averred.

Where a power was given by will to a tenant for life to lease landed estate for twenty-one years at the most rent that could be got, and houses and ground in London and Middlesex for any term of years not exceeding sixty-one, at the usual or other the most rent that could be got for the same; and at the date of the will the London houses were in lease for forty-one years at a rent of 6*l.*, for which a fine had been paid; the court of King's Bench held that the Middlesex and London property might be demised at the old rents, taking a fine. *Usual* was considered as contrasted with *most*: if the property in London had been situate in a ruinous part of the town, the tenant might not have been able to get the usual rent, and then he was to get the most. (f)

Where (g) by a private act passed in the year 1720 certain estates were settled in strict settlement, and a power was reserved to the respective tenants in tail by deed to lease any part of the

(d) 2 Bl. Rep. 617.

Treat. Pow. 611. 3d. edit.

(e) 2 M. and S. 382.

(g) Doe d. Lord Shrewsbury v. Wil-

(f) Doe d. Newnham v. Creed, 4

son, 5 B and A, 368.

M. & S. 371. *sed quere* by Mr. Sugden,

lands thereby settled for the term of three lives or twenty-one years, or for any term or number of years determinable on three lives, so as upon every such lease there should be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boons, and services for the same; and previous to the act the premises had been demised by a lease dated February 2, 1708, at a yearly rent, payable on the twenty-fifth of March and twenty-ninth of September, it was held to be no objection to a lease under the power dated the sixth of January, the reserving rent on the same days (*viz.* twenty-fifth of March and twenty-ninth of September) although it was in effect a fore-hand rent, because it was reserved on the same days as the former lease.

The sum reserved should be specifically mentioned, or be ascertained by reference to some certain measure: (*f*) but if the ancient rent in ecclesiastical leases has been reserved in gold, and it is now reserved in silver, it has been held that it shall not bind the successor, because the variation in the value of silver may be prejudicial to him. And although the same may be said if it be reserved in gold; yet, by continuing the species of reservation formerly made, every precaution is taken which the statute required. (*g*) So if a quarter of corn were anciently reserved, and now a lease is made reserving eight bushels; or if the accustomable rent had been reserved, payable quarterly or half-yearly; yet if it be reserved payable yearly, it is sufficient within the words of the statute: (*h*) and *vice versa* where the power requires a yearly rent, payment half-yearly is within the power. (*i*) In a late case, (*k*) however, the *reddendum* of a hospital lease was of "so many quarters of corn;" and this was held to mean legal quarters of eight gallons the bushel as established by the stat. 22 and 23 Ch. II. c. 12. although the old lease before the stat. 22 and 23 Ch. II. contained a similar *reddendum*, and till lately the lessees paid reckoning the bushel at nine gallons.

The reservation also of rent on leases made in pursuance of powers must be as specific as upon leases made by virtue of the statute 32 Henry VIII. In *Orby v. Lord Mohun* (*l*) the power was to grant leases of all lands anciently demised at the ancient

(*f*) *Lewson v. Pigot*, 3 Ch. Rep. 61. son, 5 B. and A. 363.
cited 2 Vern. 538.

(*g*) *Lord Mountjoy's case* 5 Rep. 5.

(*h*) *Owen v. Ap Rees*, Cro. Car. 95.

(*i*) *Doe d. Lord Shrewsbury v Wil-*

(*k*) *The Master and Brethren of St. Cross Hospital v. Lord Howard*, 6 T. R. 339.

(*l*) *Prec. in Ch.* 257.

rents, and of the other lands at the best rents that could be gotten. The power was exercised by two leases ; by one of which all the lands not anciently demised were let, reserving therefrom "the best improved rents ;" and by the other *all* the lands within the power were let, reserving "the ancient and accustomable rents." The cause was heard before Lord Keeper Cowper, assisted by Holt, C. J. and Trevor, C. J. They all agreed that the lease was void as to the demesnes, because the remainderman could not tell what to demand under the reservation of best approved rents. But as to the lands anciently demised, Lord Holt held that the rent was certain enough, and the lease good. Cowper, L. C. and Trevor, C. J. thought Lord Holt's position would not stand ; indeed, it seems obvious that the heir or successor would be put to infinite trouble and vexation if the reservation might be allowed to be made in the same or as general terms as the power itself ; and if the necessity of averring and proving what the ancient and accustomable rent was, (which is necessary, especially in actions of replevin,) were to lie upon them. (m) The same objection does not lie where a specific sum by the acre is directed to be reserved by the terms of the power ; and the reservation is in general terms referring to the power, because there is no uncertainty where there is a certain standard referred to. Therefore, where (n) a power was given by a settlement of lands in Cheshire to make leases, reserving at least 12*d.* for every Cheshire acre, and the donee made a lease reserving all the rent intended to be reserved ; this was sufficiently specific, because the *data* were known by which the exact sum of the rent might be ascertained.

It seems to be a consequence of the rule now under consideration that lands anciently demised cannot be leased together with lands not anciently demised at one entire rent : for although in effect the ancient rent should be reserved, and it should be increased by a sum equivalent to the value of the land in addition ; yet since the rent is an entire thing, and issues out of the whole and every part of the land demised, the ancient rent cannot be said to be reserved out of the part anciently demised. (o) So if two

(m) The judgment was affirmed, Dom. Proc. 3 Bro. P. C. 248. nom. The Duchess of Hamilton v. Mor-daunt; and see Owen v. Ap Rees, Cro. Car. 94.

(n) Lewson v. Pigot, 3 Oh. Rep. 61, 76. cited 2 Vern. 533. See also Shan-non v. Bradstreet, 1 Sch. and Lefr. 52.

(o) Moor. 197.

farme have been letten severally, the one for 20*l.* and the other 10*l. per annum*, a lease of both together for 30*l. per annum*, it has been said, will not bind the successor; for the ancient rent issuing formerly out of the two farms severally according to the above proportion now issues wholly out of each and every part of each; and in this case if 40*l.* or more had been reserved, yet it would not have been good, because the rents instead of being several are entire. (p) But if the reservation be several, and the ancient rent be distinctly reserved in certainty for the lands anciently demised, the lease may be good; though there be other lands comprised in the same lease (q). In *Read v. Nash* (r) it was attempted to be argued that a reservation was not good, because a house had been built on part of the estate; but the court would not suffer it to be argued.

The same rule applies to leases under powers. Where two pieces of land are included in one demise, one of which has been anciently demised and the other has not, and one entire rent is reserved, the lease will be void: but if there is a several reservation of the ancient rent for the lands anciently demised, the demise under the power will be good for those parcels, and void only for the rest. (s) It has been, however, decided that a lease comprising lands of which the lessor was seised in fee, and other lands of which the lessor was seised for life only, with a power to lease at one entire rent, is good for the lands in fee simple, because the rent might be apportioned after the death of the lessor. (t)

Where a gross sum is reserved generally, and part of the land is not comprised in the power, or being comprised in the power is not duly demised, it seems to be admitted on all hands that this is a bad execution of the power, although the rent upon an apportionment would be sufficient for both estates. But Mr. Sugden conceives that where, as in *Campbell v. Leach*, (u) a rent is reserved according to the quantity of produce, as the tenth of the produce of every mine, or 40*s.* an acre, or the like, there, although the demise is joint in terms, and part is not well demised, or not comprised in the power, yet it shall be good as to the lands com-

(p) *Smith v. Trinder*, Cro. Car. 23. and S. 108.

Smith v. Bole, Cro. Jac. 458.

(t) *Doe d. Vaughan v. Meyler*, 2 M.

(q) *Tanfield v. Rogers*, Cro. Eliz. 340.

and S. 276. See *Stevenson v. Lambard*, 2 East. 575.

(r) 1 Leon. 147.

(u) *Ambl.* 740.

(s) *Doe d. Bartlett v. Rendle*, 3 M.

prised in the power and duly demised. The principle contended for by Mr. Sugden might, perhaps, be more simply stated, that wherever the reservation, although not several, is such, that without inconvenience to the remainderman it may be apportioned by the act of the parties; or, in other words, if by reference to something certain the reservation is in effect several, although apparently joint, the lease may be a good execution of the power; for in such a case the reservation makes it several leases.

Formerly it was doubted whether a bishop, tenant in tail, or other person enabled by the statute 32 Henry VIII. seised of lands usually letten for an entire rent could have made a lease of part, reserving rent *pro rata*. (x) But the better opinion seems to have allowed of such leasing, because in effect the ancient rent was reserved. This doubt, however, has been since removed, as to the ecclesiastical leases, by the statute 39 and 40 Geo. III. c. 41. (y) But the act, very unaccountably, does not remove the doubt as to leases by tenants in tail or husbands seised *jure uxoris*; nor does it make valid leases by ecclesiastical persons of two or more farms which have usually been let separately.

It was, however, never doubted that if lands descended to coparceners, each might let her own part reserving rent *pro rata*, because the descent which caused the coparcenary was an act of law which never operates to the prejudice of any person. So if a manor has been usually let at 10*l.* *per ann.* and a tenancy escheats, a lease of the manor afterwards reserving 10*l.* is good, though the rent also issues out of the tenancy, which never was in lease before, because the escheat was an act of law, and ought not to be taken prejudicially: but if the lord had purchased the tenancy, it never could have been so leased, because the purchase was his own act. (z)

The stat. 39 & 40 Geo. III. above-mentioned is to the following effect: where the whole of the land accustomedly letten is leased in parts, the rents reserved shall be equal in the aggregate to the ancient rent; and where a part only is leased, the rents reserved shall not be less in proportion to the fine than the rent accustomed to be reserved for the whole was in proportion to the fine on the entire lease. By the 4th section no greater pro-

(x) *Threadneedle v. Lynam*, 3 Keb. 192, 372, 588, 595.

(y) Qn. Irish Statute.

(z) 5 Rep. 5 b.

portion can be reserved on a separate lease than the part thereby demised will reasonably bear, and afford a competent security for.

By the 5th sect. where any specific thing, incapable of division or apportionment, shall have been reserved, the same may be wholly reserved or made payable out of a competent part; and in case of leases already granted any provision for the payment and delivery of any sums of money, stipends, augmentations, or other things mentioned in the act, shall be taken as lawfully made, if the lands are of greater annual value, exclusive of the rent reserved to the lessor. But the act does not confirm leases on which no annual rent is reserved: (a) nor does the act extend to the provisions in cases of rent in the universities. (b)

By section 8. of the same statute it is provided that where leases have usually contained covenants for payment or delivery of any sum of money, stipend, augmentation, or other thing for the use of any vicar, curate, schoolmaster, or other person other than the lessor, all leases to be thereafter granted shall provide for the future payment and delivery out of a part not of less annual value than three times the amount of the payment so charged, exclusive of the proportion of rent reserved to the lessor. By the 9th section, the act is declared not to confirm the claim of any vicar, &c. to any payment, the continuance of which shall depend only on the will of the lessor.

By the 10th section it is provided, that persons holding leases of specific parts in trust for others, or having granted underleases of specific parts with covenants of renewal as often as their own leases are renewed, may surrender their leases in order that separate leases may be granted of such specific parts upon fair and reasonable terms, subject to an apportionment of the accustomed rents and payment; and that every such surrender, and the new lease to be granted thereon, shall be good, notwithstanding the underlessees and *cestui que* trusts may be infants, issue unborn, feme coverts, persons absent from the realm; or otherwise incapacitated to act for themselves; provided such new lease shall be for the benefit of the several persons entitled to such surrendered leases, and be expressly so declared in the body of such new leases.

It has never been necessary to decide these points with reference to private powers: but, to prevent doubt, it should be ex-

(a) Sect. 6.

(b) Sect. 7.

pressly declared, that leases may be made of part under the power, reserving rents *pro rata*; and that lands usually demised by several leases at several rents may be demised by one lease at the aggregate rent of the old rents.

By the stat. 32 Hen. VIII. c. 28. it has been enacted that the rent should be reserved yearly at least: but this is also the general supposition of law, if the rent is reserved generally. By the express contract of the parties, it may be made payable at any other intervals, as quarterly or half-yearly, during the term. If, however, any question arises between the landlord and tenant as to whether the rent is payable quarterly or half-yearly, evidence of the mode in which other tenants pay their rent has been held not to be admissible. (c)

In all cases care must be taken that the rent days are during the continuance of the term, because, by supposition of law, the rent issues out of the land during the enjoyment of it by the lessee. If, therefore, a man makes a lease in the month of February, reserving a rent payable at Michaelmas and Lady-day during the term, the law will marshal the words, and transpose them, *viz.* at Lady-day and Michaelmas during the term. (d) So where there was a lease for life rendering rent at Michaelmas, and then the lessor further leased the same premises to the executor of the tenant for life till Michaelmas after his death; this was held to include Michaelmas day, or otherwise the lessor would lose his rent. (e)

In a lease, however, of Blackacre, to commence at a day to come, and of Whiteacre to commence immediately, a reservation of rent for the whole, payable before the commencement of the lease in Blackacre, is good; because the rent issues out of the whole land; and, therefore, in the mean time Whiteacre is liable to distress for the whole rent. (f)

In this respect heriot service is similar to rent, inasmuch as it cannot be paid before the commencement of the term; neither can it be demanded after its determination: therefore, where a lease for years was made determinable on lives, and to commence *in futuro*, with the reservation of a heriot upon the death of each of

(c) *Carter v. Pryke*, Peake N. P. C. 217. b.

93.

(e) 3 Leon. 211. pl. 277.

(d) *Hill v. Grange*, Plow. 171. Long

v. *Harrison*, 3 Keb. 209. Co. Lit.

(f) *Falstaff's case*, 2 Roll. Rep. 467.

but see *St. John v. Child*, *ibid.* 213.

the *cestui que vie*, it was held not to be payable before the commencement of the term, although one should die before that time. (g) So also it has been much doubted whether a heriot reserved in a similar manner could be demanded on the death of the last *cestui que vie*, because *eo instanti* the term would be determined. (h)

Rent, properly speaking, is the consideration for past enjoyment: it may, however, be stipulated to be paid in advance at the beginning instead of the end of the year; although this will, in judgment of law, alter the quality of the first payment, which will be a fine or fore-gift; and no rent will be paid for the last year. (i) This distinction, however, does not seem to be attended with any practical consequences: and the contract in this, as in most other instances, is governed by the intention of the parties. (k)

If a lease is made rendering rent at the two usual feasts of the year, this shall be intended to be at Michaelmas and Lady-day, and by equal portions. (l) It seems to follow, likewise, that if special days of payment are mentioned in the *reddendum*, the computation of the rent must be according to the *reddendum*, although the term may commence at some other time. (m)

Extrinsic evidence may sometimes be admitted to establish a customary right between a landlord and tenant, though such customary right is not expressed in the deed or lease, provided that it is not inconsistent with any of the stipulations. On this principle it may be shewn that a heriot is due by custom on the death of tenant for life, though not expressed in the lease. (n)

In a settlement by Sir John Fortescue he reserved a power to make leases with fine or without fine, and rendering such rents and services as he should think fit. He made a lease without reserving any rent; and this was held good within the power, because it being to reserve such rent as he should think fit, and he having thought fit to reserve no rent, this should not avoid the

(g) *Lanyon v. Carne*, 1 Lev. 295.
2 Saund. 165.

(h) *Osborne v. Sture*, 3 Salk. 181.

(i) *Cook v. Harris*, Per Holt, C. J.
1 Ld. Raym. 367.

(k) *Holland v. Palser*, 2 Stark. N. P.
161.

(l) 2 Roll. Abr. 450. *Smith v. Newson*, 1 Brownl. 102.

(m) *Tomkins v. Pinsent*, 2 Ld.
Raym. 819.

(n) Per cur. in *White v. Sayer*,
Palm. 211. and see Dougl. 202.

execution of the power, especially as he had not said "such yearly rent:" so that a pepper-corn reserved payable forty years after would have been sufficient; and therefore such matter should not be regarded as a cause sufficient to avoid the lease, where he had made it subject to a trust to pay the rents, issues, and profits to such persons as he should direct. (o)

If the rent is made payable on a certain day, or twenty days after, the lessee has his election to pay it on the day, or on the last of the twenty days: neither is it due on the first day if he neglect to pay it, so as to entitle the lessor or his personal representative to it, in case he should die before the twenty days are past. (p) If, however, rent is made payable either at Michaelmas or Lady-day, or ten days after, and the lease ends on either of these days, the ten days in the last quarter shall be rejected, because they would be out of the term, and the lessor would lose the rent. (q) Where rent was reserved at the feast of St. John the Baptist and at Christmas, or fourteen days after, the first payment to be made at Christmas next after the date; the lessee was held to have fourteen days after the first Christmas as well as the others. (r)

Rent is payable by supposition of law, during the whole term or lease, without any words to that effect. And as it is incident to the reversion, there is no necessity to mention the persons to whom it should go, because the law in such cases directs the payment of it according to the nature of the thing demised.

Rent, however, being incident to the reversion, it cannot be reserved to a stranger to the reversion, except by way of estoppel, although the lessor may sever it from the reversion when once created, and the grantee may maintain debt for it without actual privity. (s) Therefore, where it was recited in a lease that B. was heir apparent of the lessor, and the rent was reserved to B., the reservation was, nevertheless, held void; because during

(o) *Talbot v. Tipper*, Skin. 427.(q) *Barwick v. Foster*, Yelv. 167.(p) *Clun v. Fisher*, Cro. Jac. 309.

See 1 Vent. 245.

Blunden's case, Cro. Eliz. 565. *Pilk-*(r) *Anon.* 2 Show. 77.*ington v. Dalton*, Cro. Eliz. 875.(s) *Whitton v. Bye*, 1 Brownl. 80.*Thomson v. Field*, Cro. Jac. 499.*Cro. Jac.* 438. *Ards v. Watkins*, Cro.*Falstaff's case*, 2 Roll. Rep. 467. St.Eliz. 667, 661. *Robins v. Cox*, 1 Lev.*John v. Child*, *ibid.* 213. *Joselin v.*22. *Goodwin v. Parker*, 1 Freem. 1.*Joselin*, 4 Leon. 19.3 Salk. 303. *2d ed.*

the life of the lessor B. was a stranger to the reversion. (*t*) But if the rent had been reserved to the heir of the lessor, it would have been a good reservation; for although the rent was never in the father to demand, yet the son would take it as an interest inherent in the reversion, and the rent was so far in the father that he might have released it. (*u*)

So where (*x*) A. being possessed of a term of years, and an indenture was made between A. and his wife of the one part and B. of the other part, but sealed and delivered by A. only, a reservation of rent to the wife was held void, because she was no party in interest, or to the deed. But where (*y*) a custom of freebench prevailed, and a copyholder leased, reserving rent to the lessor during his life, and after that to his wife during the term, this was held to be good, to continue to the wife surviving, although she was no party to the lease; because it was said the reversion will, if possible, attract the rent to it.

Again on the same principle, where (*z*) rent was reserved on a church lease by an archbishop, payable during the vacancy to the chapter, it was considered void as to the chapter, because during the vacancy the reversion was in the crown.

A modification, however, of this principle has been countenanced in modern times for the sake of public convenience. Where, (*a*) therefore, A. agreed, in writing, to pay the rent of certain tolls to the treasurer of the commissioners appointed by an act of parliament, which vested the tolls in the commissioners, it was held that the reservation was good: but at the same time that the commissioners alone could maintain an action for the rent, and that it could not be brought in the name of the treasurer.

Although rent cannot be reserved to a stranger, yet it does not seem altogether void: but it is good to the lessor not only during his life, but generally during the term. (*b*)

If two tenants in common make a lease at one entire rent, the reservation is notwithstanding several, because the reversion is

(*t*) *Oates v. Frith*, Hob. 130. *Huntley's case*, Palm. 485.

(*u*) Co. Lit. 213. b. n. 1. *Shep. T.* 81. *contra*.

(*x*) *Bland v. Inman*, Cro. Car. 288.

(*y*) *Hill v. Hill*, Moor 876.

(*z*) *Eire's case*, Moor, 51.

(*a*) *Pigott v. Thompson*, 3 B. & P. 147. *Marchington v. Vernon*, 1 Bos. and Pull. 101. cited in note.

(*b*) Co. Lit. 213. b. n. 1. See *Deering v. Farrington*, 1 Mod. 113. 6 Vin. Abr. 376. pl. 12.

so: but if the thing reserved be not severable, then of necessity it is entire. (c) So on the other hand, if two joint-tenants make a lease by deed-poll, or by parol, reserving rent to one, yet it shall enure to both, because it follows the reversion: but if the lease be by indenture, he to whom no rent is reserved is estopped from demanding any part of it. (d)

Although it is generally true that rent is incident to the reversion; yet, that is only in cases where he who has the reversion claims under the lessor; for, if he claim by title paramount, he cannot have the rent after the death of the lessor, unless the lease be by indenture, and it be specially so reserved to him as party to the indenture: therefore, if one joint-tenant lease his moiety to commence after his death, reserving rent; his companion, surviving, cannot claim it, because he is in by title paramount. (e) So if man leases a term the property of his wife reserving rent, the wife surviving claims paramount the underlease; and, therefore, cannot have the rent. (f) So, also, if an executor or administrator, possessed of a term in right of their testator or intestate, lease for years reserving rent, and die, the administrator *de bonis non* cannot have the rent: but the executor of the executor may take advantage of the contract, although he claims immediately from the first testator. (g)

In some instances, although the reservation has been erroneous, the law has made it conformable to the nature of the estate. It has been determined accordingly, that if a tenant in tail make a lease rendering rent to him and his heirs, the rent shall go to the heir in tail with the reversion. (h) So in cases under the statute 32 Henry VIII., or under powers in private conveyances, the rent will go according to the reversion, although the reservation be not strictly so worded. Therefore where (i) a tenant in tail to him and the heirs male of the body of his father made a lease reserving rent to him and his heirs generally, it was taken for granted that the rent would go to the heir male of the body of the

(c) Co. Lit. 197. a. Moor. 202.

145. Loftus's case, Cro. Eliz. 278.

(d) Collins v. Harding, Cro. Eliz.

contra.

606, 622. Co. Lit. 192. a.

(g) Norton v. Hervey, 1 Ventr. 259.

(e) Harbin v. Barton, Moor. 395.

Davie v. Drury, cited 1 Vern. 94.

Co. Lit. 184. b.

Bransby v. Grantham, Plow. 525.

(f) Co. Lit. 46. b. Drew v. Baily,

(h) Co. Lit. 213. b. n. l. Godb. 102.

2 Lev. 100. Blaxton v. Heath, Poph.

(i) Cother v. Merrick, Hard. 91. 95.

father by a second *rente*, although he was neither heir general nor special to the lessor. But where (*k*) there were two coparceners tenants in tail, and the husband of one of them after her death being tenant by the curtesy joined with the other coparcener in making a lease rendering rent to them and their heirs; this was held not to be a good reservation, because it would be necessary to construe the words in two different senses; for the tenant by the curtesy can have no heirs of his body inheritable to the entail, for he has no estate tail in him: and even if "heirs" in his case were to be construed heirs of the body, he might have issue by a former *rente*, which would be heir of his body, and yet could not inherit by force of the gift. So if tenant by the curtesy, and the heir to the reversion in tail, join in a lease reserving rent to them and their heirs, this lease in like manner is not warranted by the statute 32 Henry VIII. by reason of such general reservation which would carry a moiety of the rent, at least to the heirs general of the tenant by the curtesy. (*l*)

The rent reserved upon leases made by virtue of powers in private settlements cannot be made payable to any one but the lessor, his heirs and assigns, or such person or persons to whom the reversion or inheritance will come after the death of the lessor. If, therefore, a tenant for life by virtue of a power demises rendering rent to him and his heirs during the term, it shall nevertheless be payable after his death to the remainderman. And it will be payable as a rent strictly, and not as a sum in gross, though the remainderman claim not under the person executing the power: for these leases, when executed, are derived, not out of the interest of the person executing, but of the person creating the power, and precede all the other estates limited by the instrument from which the power is derived; so that the remainderman or reversioner, strictly speaking, claim the reversion under the person making the lease. (*m*) So where A. seised of a reversion expectant on an estate for life in certain lands, and being also seised in fee of other lands, levied a fine to the use of B. for fifteen years remainder to himself for life, with power to lease for twenty-one years or three lives in possession, it was held that a lease made by

(*k*) Thompson's case, Latch. 45.

(*l*) Stacy v. Clerk, cited Palm. 484.

(*m*) See 1 Rep. 139. a. where it is called a sum in gross: but *contra*, in

Tho. Jon. 35., which cites Harcourt v. Poole, 1 And. 275, and 2 Roll. Abr. 261. pl. 9. Sands v. Ledger, 2 Lord Raym. 792.

A. in pursuance of his power charged the possession immediately, notwithstanding B.'s term of fifteen years, but that B. was entitled to the rent reserved in the mean time. (z)

It seems to have been determined that a rent reserved to a lessor or his heirs is incapable of remedy, and that it will be extinguished by the death of the lessor; and in Mallory's case (o) a rent reserved to the abbot or his successor seems to have been saved by the words "during the term." So likewise it seems to have been determined that although executors and administrators cannot have the rent of freehold lands, though specially reserved to them, yet a rent reserved to a lessor, his executors and administrators, or to the lessor and his assigns, indicates an intention that the rent should not go with the reversion, and therefore that it will be extinguished by the death of the lessor; (p) yet in *Sacheverell v. Frogate* (q) the court held that the words "during the term" would save such a reservation, and carry it to the devise of the lessor; and this decision was very much on the authority of Mallory's case. But if a lessee for years underlease reserving rent to him and his heirs, it will nevertheless go to the executors. (r)

A man may reserve one sum during one part of the term, and a different sum during the rest; and the whole shall be considered one rent. So he may reserve one rent to himself and another to his heirs. (s) But if tenant in tail make a lease for years according to the statute, reserving the accustomed rent to the issue in tail, without making any reservation to himself, it is said not to be a good reservation, because it is not according to the words of the statute. (t) But there is no objection to tenant in tail releasing the whole or part during his own life; and if the issue or successor accept the diminished rent, he is precluded from suing for the whole originally reserved. (u)

It is not necessary to mention any place where the rent shall be payable. In common cases the law has appointed the land, which is the debtor, to be the place where it is payable, and where the

(z) *Fox v. Prickwood*, Cro. Jac. 847.

(o) 5 Rep. 111. b.

(p) Dy. 44. a. *Edwya v. Wootton*, 12 Rep. 35.

(q) 2 Samsd. 867.

(r) 2 Samsd. 871. a. 7.

(s) *Smith v. Newsum*, Yelv. 189. *Holland v. Hopkins*, 4 Leon. 8. *Martin v. Wentworth*, Noy. 1.

(t) Hard. 90, 93. 5 Rep. 6. a. Lord Mountjoy's case, Resol. 4th.

(u) *Dyer* 128. a. 304. a. 2 Roll. Rep. 403, 407. Ley. 78.

lessor must demand it; and yet, if it be reserved payable at any place off the land, it is notwithstanding rent, and must be demanded as such at that place. If the rent is made payable at S. or D., the rent must be demanded at both places, because the lessee has his election at which to pay it. (*x*)

In the king's case the place appointed by law is the proper office in the Exchequer for the receipt of dues: but if the king assigns the reversion, it becomes payable on the land, although it be specially made payable at the Exchequer; for that is nothing more than what the law implies. (*y*)

In old leases, in addition to the rent there was frequently a sum reserved by way of penalty to enforce the punctual payment of rent or other duties; which penalty was called a *nomine pœnæ*. A *nomine pœnæ* runs with the land, and is incident to the reversion: (*z*) but if the rent be severed from the reversion, the *nomine pœnæ* will pass with the rent, though not named, because it is a security for the payment of the rent. (*a*) A *nomine pœnæ* is now very rarely reserved on leases.

It may be useful to observe in this place that by the statutes relating to settlements of the poor the rent reserved is a criterion of the value without reference to accidental circumstances which may make it to the pauper worth more than it can be intrinsically valued at. Therefore a residence of twelve months (*b*) upon a tenement of the yearly rent of 10*l.*, the landlord paying rates and taxes, will confer a settlement. (*c*) So the taking of a tenement which by having been cropped with clover and grass seed by the landlord when let to the tenant was worth 10*l.* a year, will confer a settlement. (*d*) By the stat. 59 Geo. III. c. 50. the settlement by renting a tenement after the act (2d July, 1819,) must be by renting a house or land in the same parish of the actual value of 10*l.* a year, and held and rent paid for one year, the house or building being a distinct and separate dwelling-house, and all the land being in the same parish. Forty days' residence under such

(*x*) 2 Roll. Abr. 423.

895.

(*y*) Co Litt. 201. b. Borough v. Taylor, Moor. 404. Hagan's case, Sav. 131.

(*b*) Stat. 59 Geo. III. c. 50.

(*c*) R. v. St. Paul's Deptford, 13 East. 320. R. v. Framlingham, Burr. S. C. 748.

(*z*) Thinn v. Cholmley, Cro. Eliz. 383.

(*d*) R. v. Purley, 16 East. 126. R.

(*a*) Brendloss v. Phillips, Cro. Eliz.

v. West Cramore, 2 M. and S. 132.

circumstances before that statute would have conferred a settlement. (e) If a Fleet prisoner take a house in this manner within the rules, it will confer a settlement. (f)

The stat. 13 Geo. III. c. 8., commonly called the general Turnpike Act, prohibits persons from gaining settlements by renting the tolls of a turnpike-road; and the court has considered a road a turnpike-road, although it was made under a local act, and the words "turnpike-road" did not occur in it. (g) But the general turnpike act does not extend to the tolls of a bridge which does not appear to be part of a turnpike-road. Therefore the renting the tolls of a bridge, vested by act of parliament in a company of proprietors who were declared a corporation, will confer a settlement, although the tolls were made personal estate, and the renting was not stated to be by deed. (h)

A tenement found to be of the value of 4s. a week, and to be demiseable at that rate at all times of the year, if let by the week, but not to be of the value of 10l. a year if let by the year, will not gain a settlement. (i) But a settlement may be gained by renting a tenement of above 10l. a year in the parish where the pauper resides, although he reside during the time as a servant to a collector in a turnpike-house: for the general turnpike act only relates to renting the tolls by the gatekeeper who resides in the toll-house. (k) Where (l) a pauper took a tenement of 11l. a year, which he occupied, still receiving parish pay for six months after, having previously agreed to underlet to another a part for 5l. a year, which other guaranteed to the landlord the payment of the rent without which he would not have let to the pauper, but the pauper paid the whole; it was held that the pauper was legal tenant for the whole, although perhaps the landlord did not give him credit for the whole, and therefore the pauper had gained a settlement.

Where a pauper was permitted to occupy a tenement worth 10l. a year in consideration of services, he was held to have gained a settlement. (m) But where a pauper rented land of the annual value of 6l. 10s. 6d., and built on part of it a post windmill at the expense

(e) *R. v. Amwell*, 1 Str. 529. *R. v. Fillongley*, 1 T. R. 458. *R. v. Knighton*, 2 T. R. 48.

(f) *R. v. St. Martin's Ludgate*, 2 Str. 924.

(g) *R. v. Elvet*, 11 East. 93.

(h) *R. v. Bubwith*, 1 M. and S. 514.

(i) *R. v. Hellingly*, 10 East. 41.

(k) *R. v. Denbigh*, 5 East. 333.

(l) *R. v. Hooe*, 4 East. 362.

(m) *R. v. Melkridge*, 1 T. R. 598, *R. v. Fillongley*, 1 T. R. 458.

of 120*l.*, which, by agreement with his landlord, he might remove at his pleasure ; and he let the mill for a part of the time at the rent of 9*l.* *per annum*. This was held to be no tenement to confer a settlement, because the mill was a mere chattel, the property of the tenant and not of the landlord ; it was also detached from the ground. (*o*)

In all cases a residence for the time required by law is indispensable ; and therefore, if the tenant be forcibly prevented, he cannot gain a settlement. (*p*) But a wife cannot be removed from a tenement of 10*l.* a year, in the occupation of her husband, although he reside elsewhere. (*q*)

Where (*r*) A. agreed with B. on B.'s taking a farm from C. of the yearly value of 120*l.* to become joint partners with B. in the stock and farm without any agreement between A. and C., and A. resided with B. forty days on the farm, he gained a settlement.

In a late case (*s*) it was held that a pauper did not gain a settlement by having hired a tenement of more than 10*l.* a year value, and having resided therein more than forty days altogether, but less than forty days before the passing of the statute 59 Geo. III. c. 50. by which a residence of twelve months is necessary. The statute had in view, as appears by the preamble, the preventing of the disputes and controversies which had arisen respecting the settlement by renting tenements ; and the court thought this object would be best attained by confining the inquiry to the fact whether a settlement had been acquired before the second of July, 1819, the time from which the act took effect.

VIII. Although a freehold lease is itself nothing more than a covenant real, and a tenant for years holds the land by virtue of the personal obligation or covenant implied in his contract ; (*t*) yet it has been considered necessary in modern times to add express covenants, varying according to the nature of the property demised, and the exigencies of the parties. The general object of such covenants is either to qualify the legal obligation of the contract, or to provide for certain objects, or against certain

(*o*) *R. v. Londonthorpe*, 6 T. R. 377.

(*r*) *R. v. Scanner*, 6 T. R. 354. *R. v.*

(*p*) *R. v. Llanbedergock*, 1 T. R. 103.

Dunn's Ten, Barr. & C. 393.

(*s*) *R. v. Marylebone*, 4 B. & A. 681.

(*q*) *Leeds v. Blackford*, 1 Bl. 406.

(*t*) *Gilb. Ten*. 30. *Lim. Soc.* 411.

inconveniences for which the law has not provided sufficient remedies. These covenants are usually between the lessor and the lessee, and bind them and their representatives; but they may likewise be between either party, and any third person who shall be party to the deed: in the latter case, however, there is this inconvenience; that it is merely a personal and collateral covenant, unless the party covenanting has the legal estate. If, therefore, the mortgagor and mortgagees join in a lease, the covenants in order that they may run with the land must be with the mortgagees; because in the eye of the law the mortgagor is a mere stranger to the estate. (u)

1. The covenant for quiet enjoyment for the payment of rent and taxes, or other public burthens, are applicable to most cases of demise. In farming leases it is usual to insert a covenant to manage the farm according to the most approved modes of good husbandry; and, where buildings are comprised in the lease, covenants to insure against fire (x) seem to be indispensable. Besides these there are many others adapted to each particular case, which may be moulded according to the subject matter and the wishes of the contracting parties.

In the case of parol leases, or leases in writing for years not under seal, it has been long decided that the consideration of occupation and payment of rent is sufficient to maintain assumpsit on a promise to protect the enjoyment of the lessee. (y) And in one case it was held that no lawful title of entry need be shewn in such a promise. (z) But in *Mayor v. Grigg*, (a) which seems to be the same case, it is stated that the plaintiff in his declaration set forth the eviction to have been *per judicium curiæ*; and after verdict the court thought it sufficient. So if the lease is by deed, there is an implied covenant on the part of the lessor to protect the possession of the lessee in the most ample manner. (b) This covenant is sometimes called a warranty; but warranty is more

(u) *Webb v. Russell*, 3 T. R. 393.

Stokes v. Russell, 3 T. R. 678.

(x) See *Doe d. Pitt v. Laming*, 4 Campb. N. P. C. 73. *Doe d. Pitt v.*

Shewin, 3 Campb. N. P. C. 134.

(y) *Pearl v. Edwards*, 4 Leon. 102.

Pearl v. Unger, Cro. Eliz. 94.

(z) *Gregory v. Mayo*, 3 Keb. 744. 755. 2 Lev. 194.

(a) 7 Mod. 293.

(b) *F. N. B.* 1 Salk. 197.

properly applicable to freehold leases, on which the remedy was by real action. (c) The distinction is important. A warranty is a covenant real, annexed to an estate of freehold or inheritance by which the warrantor bound himself and his heirs, either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield in case of the eviction of the grantee other lands equal in value to the lands lost; or it might be used in defence of the possession by rebutting the title of the person entitled, if he was bound by the warranty. This warranty might be either express or implied; lineal or collateral, *i. e.* it might be made either by the person through whom the heir claimed title, or by some person having a collateral title to the estate in possession: in the latter case it bound the heir without assets; in the other it did not bind unless assets descended. But it could in no case be annexed to an estate for years.

The reason of this distinction is well explained in an excellent note by Mr. Butler to Coke upon Littleton. (d) Before the statute *quia emptores*, if lands in fee were granted by the word "*dedi*," to be held of the grantor himself; then, without any other warranty, the feoffor and his heirs were bound to warranty. This was also enacted by the statute *de bigamis*, stat. 4 Edw. I. c. 6.; and according to Lord Coke this statute was merely declaratory of the common law in this respect. The warranty in this instance was a consequence of tenure; and so necessary a consequence, that where an express and qualified warranty was introduced, it did not restrain or circumscribe the implied warranty. Where lands were granted to hold of the chief lord of the fee, there was no tenure between the grantor and the grantee; and the consequence was, that there was no warranty arising from tenure. Still there was a personal warranty from the grantor as a consequence of the gift; although it did not apply to the heir. The statute *quia emptores* put an end to the first kind of warranty here mentioned, and left only the latter on such grants in fee simple. Afterwards in the case of grants in fee tail and for life the distinction, which has been mentioned in the introductory part of this work, arose, that where a man seised in fee granted for life or in tail, reserving the reversion to himself, the tenants of the particular estate held of him, and he of the chief lord: where he granted for life or in tail, with remainder over in fee, there

(c) F. N. B. 21.

(d) Co. Litt. 384. a. n. 1. 17th edit.

the grantees held immediately of the chief lord. In the former case, the tenure remaining between the donor and donee, the warranty remained as before the statute: but in the latter there was no warranty except a personal one, unless the "heirs" of the grantor were expressly named. But leases for years, as we have before observed, rested merely in contract; the tenant had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, whoever recovered the freehold reduced the term. The lessee's remedy was in contract. By virtue of that, the words "yielding and paying" were construed to be a covenant for the payment of rent; and the words "demise, grant," &c. were held to be a covenant in favour of the tenant, which enabled him to recover damages in case of eviction. In this sense they are held to imply a warranty. From the warranty of freehold estates it differs in its nature; as that arises from tenure, this from contract; and in its operation, as that being a consequence of tenure is not modelled by express warranties; this arising from the contract of the parties may be modified and regulated by express covenants introduced into the lease.

Warranties are divided by Littleton into binding warranties, and those which commence by disseisin: binding warranties are generally such as we have mentioned; those which commence by disseisin are thus explained by Littleton. (e) As where there is father and son, and the son purchases land and letteth it to his father for years, and the father makes a feoffment in fee, with warranty, or if the father is *particeps criminis* in disseising the son, such warranties do not bind the son: because it cannot be presumed that one who is so unjust as to do a wrong, would be so just as to leave a recompence, to his heir. But if, in common cases a lessee for years or at will make a feoffment with warranty, such warranty will bind the heir if he have assets, because it is in that case a lineal and not a collateral warranty; for this is a good feoffment against all but those which have right.

An express warranty could only be by the word *warrantizo*; but by the statute *de bigamis* (f) "*dedi*" is made an express warranty during the life of the feoffor. "*Dedi et concessi*" or

(e) Litt. 698.

(f) *Supra*,

"*dedit*" only, make an implied warranty in a feoffment : but "*concessi*" or "*dimisi et concessi*" are not sufficient. (g)

In the case of *Pinecomb v. Rudge* (h) the question was whether in the case of an eviction for years an action of covenant might be brought for damages on a clause of warranty annexed to a freehold lease : and it was agreed by all the judges in the Exchequer Chamber that the action of covenant would lie, because, though the warranty was annexed to the freehold, yet the breach was of a chattel for which there could neither be a voucher, rebutter, nor judgment for value in *warrantia chartæ* ; and therefore a real warranty is a covenant real, when the freehold is brought in question ; yet it may be used as a personal covenant to recover damages, where a lease for years or any other loss is the point in dispute. An action of covenant will also lie on a warranty on a *fine sur concessit* by a *tenor covert*. (i)

By the stat. 11 Hen. VII. c. 20. all warranties by *tenor tenant* in dower are void against the heir of the husband ; and by the stat. 4 and 5 Ann. c. 16. s. 21. all warranties by tenant for life are void against those in reversion or remainder ; and so are all collateral warranties made by any ancestor not having an estate of inheritance in possession.

Where (j) A. and his wife, seized in right of the wife for the term of her life, leased by indenture by the words "*demise and to farm let*" for years, if the wife should so long live, and afterwards the wife surviving avoided the lease, the question was whether this covenant in law extended beyond the husband's life : and it was held that it did not, for a covenant in law will not bind to an inconvenience. So if tenant for life makes a lease for twenty years, and covenants that the defendant shall enjoy during the term, and then dies, the covenant is discharged : but otherwise, if he covenants for twenty years. So the implied covenant in a lease for years by tenant for life, by the words "*dimisi et ad firmam tradidi* ;" does not extend beyond his life. (k) So if tenant in tail with remainder in tail, to his own heir general, make a lease for lives according to the stat. 32 Hen. VIII. with war-

(g) Sheph. T. 184.

(h) Hob. 3.

(i) Wootton v. Hele, 1 Lev. 301.

(j) Bragg v. Wiseman, 1 Brownl. 22.

Swain v. Series, 1 And. 12. Cheyney

v. Langley, 1 Leon. 179.

(k) Swain v. Series, Cheyney v.

Langley, *ubi supra*.

ranty, and then die without heirs, the lease not being a discontinuance will cease with the lessor's life, and the warranty with it. (l) So if tenant in tail make a lease not warranted by the statute, and covenant generally for quiet enjoyment, the covenant will determine with his death; because the estate of the tenant in tail to which the covenant is annexed is determined by the death of tenant in tail. (m) The law in such cases considers only what the lessor may lawfully grant; and therefore even in express covenants if the covenant be for enjoyment during "the term," or "during the demise or lease," such words are not construed as absolute covenants, but are referred only to the probable duration of the lease, according to the interest which the lessor can legally grant. If any thing further is intended, it must be clearly and absolutely set forth.

By the covenant in law in leases for years the lessor engages that the lessee shall enjoy against his own acts, and all lawful interruptions of strangers: (n) but, by the express covenant in modern use, it is usual to qualify this general covenant; and the lessor thereby covenants against the acts only of himself, and those claiming under him. If therefore there is no covenant for title, and only such an express covenant for quiet enjoyment, the lessee for years upon eviction by title paramount cannot recover under the general covenant implied in the word "demise." (o)

It is matter of familiar practice, observes Sir W. D. Evans, that a tenant cannot be allowed to dispute the title of the landlord under whom he holds, or whose title he has acknowledged. It is also manifest that in consequence of the application of the rule, a tenant is very often subjected to great difficulty and embarrassment from conflicting claims. It is agreed, indeed, that any difficulties upon the subject may be obviated by express stipulation. Tenants, however, and purchasers, may not be sufficiently upon the alert, in anticipating the consequences of the engagements entered into. Where therefore a large considera-

(l) *Keene v. Cope*, Cro. Eliz. 602.

(m) *Andrew v. Pearce*, 1 N. R. 158.

(n) *Andrews's case*, Cro. Eliz. 314.
Mountford v. Catesby, Dy. 322. a.
Anon. Styl. 67. *Major v. Gigg*, 2
 Mod. 213. *Lee v. Seabra*, 2 Keb. 717.
 723. *Hayes v. Bickerstaff*, Vaugh. 118.

Style v. Hazing, Cro. Jac. 72. *Dudley v. Polliott*, 3 T. R. 587.

(o) *Merrill v. Fyame*, 4 Tunt. 329.
 See *Wheeler's case*, 4 Rep. 80. *Brown v. Brown*, 1 Lev. 37. *Dan. 71*. *Corvis v. Pende*, Cro. Eliz. 604. *Broughton v. Conway*, Dy. 240. a.

tion is given either in the shape of premium or expenditure, care should be taken to insert an express stipulation for a general and absolute covenant for peaceable enjoyment, not leaving the subject to the uncertainty which at present attends the question, whether such a covenant can be required generally by a lessee, or whether he is only entitled to claim a covenant against the personal acts of the lessee, and the persons claiming under him.

It is sometimes necessary, where a defect in title is obvious, for the lessor to covenant against the acts of a particular person; and such a covenant will be a protection against the entry of such person, whether by right or wrong; because, if it was confined to his legal claim only, the effect would be to compel the lessee to try the right, which it was the manifest intention of the parties to prevent. (o) So also it seems that if the lessee brings an action of covenant upon the usual covenant for quiet enjoyment for the tortious entry of the lessor, the court will not drive him to his action of trespass; because the lessor has by his general covenant undertaken not to avoid his own deed. (p)

Where (q) tenant in tail with reversion to the crown leased for years, and covenanted for quiet enjoyment against all persons except the queen, her heirs and successors, kings and queens of England, and the queen granted over the reversion, the assignee was held not to be within the exception.

If the lessor covenant for him and his heirs to save harmless against all persons claiming under him, this will extend to the widow of the lessor, if she is entitled to dower. (r) So also where one purchased by fine to himself and his wife, and having made a lease covenanted for quiet enjoyment without disturbance by him, or any other person by his means, title, or procurement; this included the wife who ousted the lessee after the death of the lessor; for the fine was levied by the procurement of the lessor. (s)

If the lessor's estate is on condition, and he demises with a covenant that the lessee shall enjoy without impeachment by him, or any other through his impediment, interception, means,

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| (o) <i>Foster v. Mapes</i> , Cro. Eliz. 212. | Eliz. 517. |
| <i>Chaplin v. Southgate</i> , 10 Mod. 384. | (r) Godb. 333. |
| <i>White v. Ewer</i> , Cro. Eliz. 823. | (s) <i>Butler v. Swinnerton</i> , Palm 339. |
| (p) <i>Cross v. Young</i> , 2 Show. 426. | See Dy. 255. a. pl. 4. |
| (q) <i>Woodroffe v. Greenwood</i> , Cro. | |

and consent; and afterwards breaks the condition, this is a breach of the covenant for quiet enjoyment. (t) So where (u) the uses were declared to A. and his heirs, on condition that if they did not pay four pounds *per annum* to the conusor, the conusor might enter; and A. enfeoffed B. who leased the premises for years, with a covenant for quiet enjoyment; it was held that eviction by A. was a breach of the covenant, although the lessee might have paid the annuity in salvation of his own estate.

If a parson lease his rectory with a covenant for quiet enjoyment during the term, without any expulsion or any act to be done by the lessor, and then the lessor is deprived, this has been held not to be within the covenant, because it is a mere non-feasance. (x) So if a parson covenant for quiet enjoyment as long as he continues parson, this leaves him at liberty to avoid it by resignation, non-residence, or any other way. (y)

In some of the old cases (z) it was conceived that a decree in chancery did not come within the meaning of the words "lawful eviction," although it deprived the lessee of his possession, by decreeing that a stranger and not the lessor is entitled to the land; but whether courts of law in modern times would countenance such a construction against the good faith of the contract admits of much question: and in the case of *Hunt v. Danvers* (a) all the judges held upon error in the exchequer-chamber, that a suit in equity was such a breach of an agreement for the quiet enjoyment of tithes, as the courts of law might take notice of. So if the covenant be that the lessee shall enjoy during the term quietly and without interruption, and discharged from tithes and other duties, and that if the tithes are demanded and recovered against him during the term, he shall retain in his hands so much of the rent as the tithes amount to, a suit, though after the term, is a breach of the covenant. (b)

A covenant for quiet enjoyment may have a retrospective as well as prospective operation; therefore where (c) the lessor

(t) *Stevenson v. Powell*, 1 Bulstr. Moor. 859.

182.

(a) *Tho. Raym.* 370.

(u) *Smith v. Warren*, Cro. Eliz. 688.

(b) *Launing v. Lovering*, Cro. Eliz.

(x) 4 Leon. 38. pl. 104.

916.

(y) *Wheeler v. Heydon*, 1 Brownl.

(c) *Lewis v. Hellier*, 2 Keb. 291.

125.

1 Sid. 374. *Osney v. Hicks*, Cro. Jac.

(z) See 3 Leon. 71. *Selby v. Chute*, 263.

covenanted that his lessee should enjoy for nine years from the year 1664, A. D. which was two years before the sealing and delivery of the lease; this covenant was held to extend to time past as well as future: for it was a security for the term in computation of time, although the party was not bound till the sealing and delivery of the deed.

Executors and administrators are bound without being named: but heirs are not bound without being named; nor are heirs bound, though named, unless the obligation commences with the ancestor; but it seems to be allowed that a man may bind his executor without naming himself. Executors are bound in all cases except where the act is personal; and even there, if there is a breach in the life of testator, an action will lie for the breach against the executor. (*d*)

The enjoyment meant both by the law and by express covenants must be taken to be legal enjoyment, without the permission of any other person: therefore, where a second lease was made during a prior demise, it was held to be no answer to the plaintiff's demand in an action of covenant, that during the first half-year of the plaintiff's lease he might have enjoyed: but that for non-payment of rent for 21 days after such half year, the defendant had a right to re-enter according to a proviso in the lease; because the defendant's covenant meant a legal entry and enjoyment, without the permission of any other person. (*e*) So also an action will lie on the covenant in law, without actual entry and expulsion, if at the time of the demise the lessor could not give lawful possession; for "*dimisi*" implies the power of demising, and it is not reasonable to compel the lessee to enter and commit a trespass. (*f*)

The covenant for quiet enjoyment also extends to protect the lessee in all those rights and privileges which are necessarily incident to his estate; an action therefore will lie on this covenant for the disturbance of a way of necessity. (*g*) But where the grant is of a mere easement in the lessor's land, the lessor is not bound to repair the subject matter on which the enjoyment of the easement depends, although he expressly covenant for quiet enjoyment; and the easement may be said to be part of the demised premises.

(*d*) Sheph. T. by Prest. 177.

(*g*) Morris v. Edgington, 3 Tenat.

(*e*) Ludwell v. Newman, 6 T. R. 456.

24. Andrews v. Paradise, 8 Mod. 218.

(*f*) Holder v. Taylor, Hob. 12.

Where, therefore, in a demise of a messuage, except a piece of ground on which a pump stood, the lessor granted the free use of the pump during the term to the lessee, and covenanted that he should enjoy the premises; it was held that the lessor was not bound to repair the pump. (*h*) The lessee, however, himself may repair it upon the principle that, by the grant, every liberty by which he may enjoy the easement passes. On the same principle, if a man demise the middle room of a house, the lessor is not bound to repair the roof: but the lessee is not thereby prevented from enjoying the room, for he may repair it himself. The distinction upon which the law in such cases depends is between acts which amount to a misfeasance and nonfeasance. If one grant a way, and disturb the lessee in enjoying it, this is a misfeasance, and covenant will lie: but in the other case the lessor does no act to disturb the enjoyment, and the law gives the lessee every liberty which is necessary to make good the grant.

Upon the construction of particular covenants many cases have occurred, but no general rule can be laid down: the only rule of interpretations is the apparent intention of the parties, according to which it is the practice to construe all deeds. Indeed there is no subject on which so little technicality prevails. From all the cases on the subject it appears that however general the words of a covenant may be when standing by themselves and alone; yet if, from other covenants in the same deed, it is plainly to be inferred that they could not have been intended in a general sense, the court will limit their operation according to the intention manifested by the parties. In *Browning v. Wright*, (*i*) therefore, the introductory words of the first covenant, which was for title, namely, "for and notwithstanding any act done by him to the contrary," were held to controul a subsequent covenant in more general terms to the acts of the party himself. In *Hesse v. Stevenson*, (*k*) on the contrary, the omission of these words was held to be decisive, in leaving the covenant in question at large; although, in a subsequent part of the sentence, the defendant covenanted that he had by no means, directly or indirectly, forfeited any right or authority he ever had or might have had over the property in question; because the court conceived that these

(*h*) *Pomfret v. Ricraft*, 1 Saund.
321.

(*i*) 2 B. & P. 13.

(*k*) 3 B. & P. 573.

If the lessee covenant to repair and keep in repair during the term, an action may be maintained for breaches during the term before its expiration; and it is not sufficient that the lessee puts the premises in repair at the end of the term, or at any time during its continuance. (*f*)

A covenant to repair during the term, or within three months after notice, will give the lessor his election either to give notice or to bring his action of covenant: but the lessee must at all events repair before the expiration of the term, for he cannot come upon the premises after the term without being a trespasser. (*g*) So where (*h*) the lessee covenanted that he would from time to time after three months' monition sufficiently repair, and at the end of the time leave sufficiently repaired; the latter clause was held to stand by itself, and the notice only applied to the repairing during the term.

A covenant to repair at all times, when, where, and as often as occasion shall require during the term, and at farthest within three months after notice, is a qualified covenant, and cannot be stated as a covenant to repair at all times when, where, and as often as occasion should require during the term. (*i*) But where (*k*) there was a covenant to rebuild a house in two years, and sufficiently to repair the same, and all other buildings to be erected during the term when, where, and as occasion should require, and the same in all things sufficiently repaired at the end of the term to yield up to the lessor, although it was followed by a covenant that the lessor might twice or oftener in the year enter to view the condition of the premises, and of all want of reparation, to leave notice in writing to repair within six months; within which time the lessee covenanted to repair accordingly: it was held that the first covenant was unqualified, and that the plaintiff might declare on the leaving the premises out of repair at the end of the term, without averring or proving six months' notice to repair.

If the lessor covenant to repair, and the lessee covenant to repair after the reparations made by the lessor, although the premises be in good repair at the time of making the lease, yet the lessor

(*f*) *Luxmore v. Robson*, 1 B. & A. 584.

(*g*) *Anon.* 2 Roll. Rep. 250.

(*h*) *Harriet v. Butcher*, Cro. Jac. 644.

(*i*) *Horpefall v. Testar*, 7 Taunt. 385.

(*k*) *Wood v. Day*, 7 Taunt. 646.

(*l*) *Slater v. Stone*, Cro. Jac. 645.

must first repair. (*l*) But where the lessor covenanted to make all necessary reparations before Midsummer following, and the lessee covenanted that he would repair to the end of the term, this was held to be no condition precedent, because it was merely a division of the time, *viz.* that the lessor should repair before Midsummer, and the lessee after. (*m*)

If in the covenant to repair the words are "the lessor allowing and assigning timber for repairs," this is a qualification of the covenant; and the lessor must aver in his declaration that he did allow, &c. (*n*) But where (*o*) the lessee covenanted to repair before the first of June, 5000 slates being found and delivered by the lessor towards the repairs, and afterwards to keep in repair, and the lessor assigned a breach in not keeping in repair after the first of June: it was held no plea to say that the lessor did not find and deliver the slates; for this was an action on another part of the covenant with which the finding the slates had nothing to do.

Where B. leased a mill and covenanted to find cogs, rounds, brasses, timber, &c. for the mill, during the term, and W. covenanted to keep them in repair, the court were divided whether these were mutual or conditional covenants. (*p*)

If the lessor covenant to repair, and does not do it, the lessee may do it, and pay himself by way of retainer out of the rent. (*q*)

This covenant also being, like all other express covenants, an independent personal contract, the lessee is not estopped thereby from cutting down trees for repair, although the covenant be that he shall repair at his own costs: he, therefore, may justify in an action of waste on this ground notwithstanding the covenant, and the lessor's only remedy is upon his covenant. (*r*)

If the lessee of a concurrent lease covenant to repair during the term, he must repair during the existence of the prior lease, because the covenant is express to that effect, and his term has commenced in computation of time. (*s*)

What shall be considered a good and sufficient repair under any of these covenants must always be a question for the jury:

(*m*) *Bragge v. Nightingale*, Styl. 140.
2 Danv. 17. pl. 15. 5 Vin. Abr. 75.
pl. 15.

(*n*) *Thomas v. Cadwallader*, Willes,
496.

(*o*) *Mucklestone v. Thomas*, Willes
146.

(*p*) *Browne v. Walker*, 1 Lutw. 394.

(*q*) *Beale v. Taylor*, 1 Leon. 237.

(*r*) Dy. 198 a. 314. b. Anon. Moor. 23.

(*s*) 3 Salk. 108.

but it has been held that upon a covenant to repair with convenient, necessary, and tenantable reparations, the lessor must shew that the house was not tenantable; and trifling deficiencies, such as of a tile or a little mortar here and there, will not support his action. (t)

Covenants in building leases may be mentioned under the same head. As such contracts are entered into for the specific purpose of building or rebuilding houses, the covenants framed to effect the object in view are specific likewise; and, indeed, since the object is merely executory, it can only rest in covenant till the covenant is performed. A covenant to rebuild several houses is, however, not satisfied by rebuilding some and repairing others, though at a considerable expense. (u) But where (x) the lessee of a building and repairing lease covenanted that within the last fifty years of the term he would take down the four demised premises, as occasion might require, and in the place thereof erect four other good and substantial messuages, it was held that it must be shewn that occasion did arise. Gibbs, C. J. said, however, that if, upon the trial of an issue founded on this case, it should appear that the repaired house was not completely and substantially as good as a new house, he should direct the jury to find for the plaintiff.

In all leases where the premises consist of buildings of any considerable value, it is usual to insert covenants for insurance against fire. These covenants usually, and indeed necessarily, specify the particular sum in which the premises shall be insured: but this has no tendency to limit the damages which may be recovered on the covenant to repair, if there is one, because they are independent covenants, although they may be in the same deed. (y)

In the case of *Preston v. Merceau* (z) Mr. Justice Blackstone, after stating that the court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added "that with respect to collateral matters it might be different; the plaintiff might shew who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the decided cases. To add, observes

(t) *Conysby's case*, March 17.

411.

(u) *The City of London v. Nash*,
1 Vez. 12.

(y) *Digby v. Atkinson*, 4 Campb.
N. P. C. 275.

(z) *Evelyn v. Raddish*, 7 Taunt.

(z) 2 Bl. 1249.

Mr. Phillips, a new term, or to define what was before indefinite, is in effect to make a material variation. (a)

A covenant to deliver up the premises at the end of the term is not an unusual covenant; (b) and if the covenant be to leave the premises as the lessee found them, it is an agreement to leave them in tenantable repair. (c)

4. In farming leases the bare relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage the farm in a husbandlike manner; (d) and a tenant from year to year (e) is under the same implied engagement as a tenant for a longer period. The mode of husbandry according to which the law implies that the lessee shall manage the land is the custom of the immediate neighbourhood: by which term "custom" is not meant that it should be immemorial, or that it should be confined to any limited space; but that the method of husbandry adopted should be according to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. (f) By means, however, of a special covenant a party may waive the benefit of the custom of the country; for where there is a written agreement, there can be no inquiry as to the custom; because it is natural to suppose that such an agreement will contain all the particulars and terms of the bargain. (g)

In the case of farming tenants the general law is that all the manure produced on the farm shall be consumed on the premises; and after the term ended, the hay, straw, litter, fodder, dung, manure, and compost on the land belong to the lessor; and the lessee can neither remove them, nor is he allowed any compensation for them. (h) In particular districts, likewise, the law permits the usage of the country to controul the contract, if such usage is not unreasonable. Thus an usage for the landlord to pay a sum in compensation to the outgoing tenant for labour and expense in tilling, fallowing, and manuring arable and meadow land according to good husbandry has been considered a reasonable

(a) 1 Phill. Ev. 592. note.

Brown v. Crump, 1 Marsh 567.

(b) Andrews v. Needham, Noy. 75.

(g) Webb v. Plummer, 2 Bl. and A.

(c) Winn v. White, 2 Bl. 840.

747.

(d) Powley v. Walker, 5 T. R. 373.

(h) *Ex parte Nixon*, 1 Ross, B. C.

(e) Onslow v. ———, 16 Ves. 173.

446.

(f) Legh v. Hewett, 4 East. 154.

usage, because the tenant could not otherwise reap the advantage of such labour and industry. (i) So, although a custom that the lessee should hold over after his term for half a year, is not good; (k) yet a custom that the awaygoing tenant shall have the crop on the land after the expiration of the term has been so held; (l) and he may house such awaygoing crop in the barns on the farm for a certain time after he has quitted the premises, if the custom so permit. (m) In all these cases, however, a special covenant may either waive the usage of the district, or controul the general law.

The effect of a clause allowing the awaygoing tenant to take away the crop is a prolongation of the term, as to the land on which it grows, and he continues in possession till the crop is taken. So where (n) the outgoing tenant had covenanted with his landlord to leave the manure on the premises, and to sell it to the incoming tenant at a valuation, it was held to give the outgone tenant a right of outstand for the manure on the farm, and the possession and property in it remained in him in the mean time; and the incoming tenant removing or using it before such valuation, was answerable to the outgone tenant in trespass. It may however be remarked that if there be no such title in the tenant to an offgoing crop, the landlord may bring trover against him for cutting it after the expiration of the lease. (o)

If there is a covenant in the lease for sowing and managing the farm, and for disposing of the dung and straw, and quitting and yielding up the premises in the manner in which the same had been managed and quitted by other tenants, and the tenant entering have notice of any prior lease, he is in general bound by such reference: but if the tenant has no notice of any prior covenant, he is only bound by the mode in which the landlord shall have permitted former tenants to manage and quit, although such former tenants may legally have been bound by some different agreement. (p)

The usages of different districts, and the usual agreements

(i) *Dalby v. Hirst*, 1 Brod. & Bingham. 224. *Senior v. Armitage*, 1 Holt. N. P. C. 197.

(k) *Moor. 8. pl. 27. White v. Sayer*, Palm. 211.

(l) *Wigglesworth v. Dallison*, Dougl. 201.

(m) *Beavan v. Delahay*, 1 H. Bl. 5.

(n) *Beatty v. Gibbons*, 16 East. 116. *Boraston v. Green*, 16 East. 71.

(o) *Davies v. Cannop*, 1 Price Ex. Rep. 53.

(p) *Liebenrood v. Vines*, 1 Meriv. 15.

between landlord and tenant with respect to quitting and yielding up the premises at the end of the term as a matter of arrangement between the incoming and outgoing tenant, seems to have produced a question whether the incoming tenant could not maintain an action against the outgoing tenant for a breach of good husbandry: but the better opinion seems to be that no such action can be maintained, although no special provision has been made contrary to the custom of the country. In one case (*q*) however, where the tenant was bound to consume all the hay on the premises, or for every load of hay removed to bring two loads of manure; and on quitting the premises he sold part of a rick of hay then standing to a purchaser without mentioning his liability to bring manure; although it was admitted that the bringing on the manure was no condition precedent to carrying away the hay as between the landlord and tenant, yet it was held that after the tenant had quitted the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till the manure should be deposited.

The statute 56 Geo. III. c. 50. has given a legislative sanction to such covenants, which greatly protects the landlord from the former legal consequences of the contract. It provides by the first section that no sheriff or other officer shall sell or carry off from any lands let to farm any straw threshed or unthreshed, or any straw of crops grown, or any chaff colder or turnips, or any manure, compost, ashes, or seaweed in any case whatsoever, nor any hay, grass or grasses, natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands in any case where, according to any covenant or written agreement entered into and made for the benefit of the landlord or owner such produce ought not to be taken off, or which by the tenor or effect of such covenant or agreement ought to be used and expended thereon, and of which covenants and agreements such sheriff or other officer shall have received a written notice before he shall proceed to sale.

By the second section of the same act it is enacted that the tenant shall give notice in writing to the officer of the existence of such covenant or agreement, and of the name and residence of the landlord; and such sheriff or other officer is

(*q*) *Smith v. Chance*, 2 B. and A. 753.

required forthwith on executing such process and before sale to send notice by the general post to the landlord or his agent, and shall in all cases of absence or silence of such landlord or agent postpone and delay the sale till the latest day he can lawfully appoint. Provided always, (r) that such produce may be sold subject to an agreement to expend it on the land according to the custom of the country where no covenant or agreement appears; and in cases where any covenant or written agreement shall be shewn, then according to such covenant or written agreement: and after such sale so qualified, it is provided that the purchaser may use all such necessary barns, buildings, yards, and fields for the purpose of consuming such crops or produce as such sheriff or other officer shall assign for that purpose, and which such tenant or occupier would have been entitled to, and ought to have used for the like purpose on such lands.

It has, however, been held that this act will not bind the crown, although passed for the purpose of general good, in promoting good husbandry. It was argued in this case that the clause in the stat. 8 Ann. c. 14. (s) saving the rights of the crown was an acknowledgment that acts of parliament in favour of agricultural interests might bind the crown, though not expressly named: but the court said they were unanimously of opinion that the proviso in the stat. 8 Ann. must have been thought necessary, because the word "extent" was used in that act. In this statute, on the contrary, the crown or the crown process is not in any way alluded to; and therefore they were of opinion that it did not bind the crown or affect the crown process. Garrow, B.—The act begins with providing for the preservation of covenants between the owners and occupiers of land let to farm, and it never loses sight of those parties till the end; and there in the eleventh section it contemplates the case of tenants becoming insolvent, and provides that the assignees shall not deal with the crops on farms otherwise than the tenant might have done: evidently in every other possible case of insolvency leaving the landlord to his remedy on the covenant, and clearly abstaining from cases where the crown might be concerned. (t)

If a man take land sowed or stocked with cattle, and covenant

(r) Sect. 3.

sued against their tenants. See *post*.

(s) Enabling landlords to recover a year's rent in cases of executions is-

(t) The King in aid of *Osbourne v. Osbourne*, 6 Price, Exch. Rep. 94.

to leave it in the same plight, he must leave it sown; or, if the cattle die, he must supply their number. (u)

A covenant by a lessee that he will sufficiently muck and manure the land, with two sufficient sets of muck, within the last six years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the last three years. (x)

5. The next point with reference to which covenants are usually made comprehends taxes, rates, and other burthens imposed either directly by parliament, or by county and parochial regulations.

The land-tax made perpetual by the stat. 38 Geo. III. c. 60. is the landlord's tax, as between the landlord and tenant: but, with reference to the public, it is the tenant's tax. (y) The land-tax acts have always in the first instance charged the occupier: but they direct him to deduct out of the rent so much of the rate as in respect of such rent the landlord ought to bear; and the landlords mediate or immediate are required to allow such deductions.

The landlord under these acts must pay the rent according to the rent he receives, and not according to the rent at which the premises are taxed; (z) therefore where there was a covenant on the part of the lessee to pay all taxes except the land-tax; the landlord was bound only to pay the old land-tax, and not the additional land-tax occasioned by the improvement of the estate. (a) So if the tenant is under-assessed, he can only deduct *pro rata*. (b)

Where (c) a person took seven-sixteenths of certain premises, the whole of which were then rated at the annual value of 35*l.*, and the lessor covenanted to pay all taxes then chargeable on the premises, or on any part thereof; or on the yearly rent thereby

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| (u) Prest. Shep. T. 174. | 1 Salk. 198. |
| (x) Pownall v. Moore, 5 B. and A. 416. | (z) Yaw v. Leman, 1 Wils. 21. Barnfather v. Lee, East. T. 26 Geo. III. K. B. Whitfield v. Brandwood, 2 Stark. N. P. C. 440. |
| (y) R. v. Mitcham, Cald. 276. R. v. St. Lawrence, Cald. 379. R. v. Eadow, Cald. 374. Exall v. Partridge, 8 T. R. 308. Astley v. Reynolds, 1 Str. 916. Lord Arran v. Crisp, 12 Mod. 55. Hales v. Freeman, 1 Brod. and Bing. 391. See Brewster v. Kidgell, | (a) Hyde v. Hill, 3 T. R. 377. (b) Sherrington v. Andrews, Comb. 483. (c) Watson v. Atkins, 3 B. and A. 647. |

reserved, and the lessee covenanted to pay all fresh taxes which should thereafter be charged on the premises, or on any part thereof: it was held by Bayley and Holroyd, J.J. *dissentiente* Abbott, C. J. that the true construction of these covenants was, that the lessor should pay all such taxes as were chargeable on the premises, considering them as of the annual value of seven-sixteenths of 35*l.*; and that the lessee should pay all fresh taxes, and all such additions to the taxes formerly chargeable, as were occasioned by the improved value of the premises.

Where in 1814 a distress was made on a tenant for the whole of the rent due from him, and a deduction of the land-tax was refused, the lease being silent on the point; and the tenant having protested against his liability, paid during five successive years, without renewing in any sort the objection: it was held that in 1820, he could not recover in an action for money paid to the defendant's use any of the sums so paid for land-tax. Dallas, C. J. in delivering judgment said, on the facts the case could not be distinguished as to the general ground from former cases in which it had been held that a payment made under such circumstances is to be considered a voluntary payment. The present was stronger in degree: for resistance to a demand, dereliction of that resistance, and subsequent and uniform acquiescence, operate more strongly than a payment made in ignorance and silence would have done. The simple point, he said, on which the court had hesitated for a moment, had been as to the sum claimed to be deducted, when the distress was made in 1814; and, with a view to this, they wished to look into the case of *Graham v. Tate*: (*d*) but on consideration they thought it did not apply in favour of the plaintiff; for in *Graham v. Tate* the claim made was immediately followed up, and never afterwards abandoned; not falling therefore in point of principle within all or any of the several grounds on which, as fundamental grounds to sustain actions of this description, such cases have been decided. (*e*)

The case of *Graham v. Tate* abovementioned arose upon an agreement in a lease to pay all taxes, except the landlord's property-tax; and the tenant agreed to lay out 20*l.* in repairs, which the landlord also agreed to allow: but afterwards the landlord distrained for the rent, and sold to the whole amount without allowing either for repairs or property-tax, which last he knew

(*d*) 1 M. and S. 609.

(*e*) *Spragg v. Hammond*, 2 Brod. and B. 59.

the tenant had paid to the collector. Lord Ellenborough, C.J. "The tenant was obliged to pay the full amount of the rent under the distress, if the landlord would not consent to make the deduction in respect of the property-tax; and it does not appear to me that he has any remedy except by bringing an action. If so, the only question is as to the form of action. It seems to me that he may waive the tort, and bring an action for money had and received; if in the result the landlord has got money into his pocket which does not belong to him." Lord Ellenborough, C.J. added, that the court was of opinion in favour of the plaintiff on the question of repairs, but gave no reason: it appears however that the plaintiff ought to have declared on the special agreement, as suggested by Hullock, counsel for the plaintiff. And although the same might have been said with respect to the property-tax, yet as the property-tax act expressly empowered the tenant to deduct the property-tax, the case, so far as it related to that point, stood independent of any special agreement, and was also analogous to the case upon the land-tax act, just before cited.

The case of *Denby v. Moore* (e) is another case on the property-tax. Where an occupier of lands for twelve years paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid, and it was held that the amount of taxes so paid could not be recovered; so that this case seems to be a direct authority for the decision in the case of the land-tax act. Littledale for the defendant urged, that between these parties the relation of landlord and tenant had never existed, (for it appeared that the plaintiff, although he occupied the farm and paid the rent, was not the tenant to the defendant, the real tenant being the father-in-law of the plaintiff, in whose name the receipts for rent had been given up to his death,) and consequently that the action could not be maintained on that ground: but upon the court's intimating that the fact of the defendants having received the plaintiffs' money was sufficient to enable him to maintain the action, this ground was abandoned.

Where a tenant having paid the land-tax brought an action to

(e) 1 B. and A. 123.

recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's hand-writing, which specified the rent and terms, but was silent respecting the payment of taxes; the defendant offered parol evidence that, previously to the drawing up of the memorandum, it had been mentioned and understood by the parties that the rent was to be paid clear of all taxes: this evidence was rejected, and the court of C. P. afterwards refused a rule to shew cause why the verdict should not be set aside. (*f*)

But in a late case, (*g*) where by a local act it was provided, that the drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to the landlord; and also that in case of neglect to pay the tax, it might be levied by distress on the goods and chattels which should be found in the premises; and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment thereof, and might be taken possession of and let, in discharge of the tax. It was held that the tenants chargeable with the tax were those in whose time the tax accrued, and not the tenants for the time being. And therefore where an outgoing tenant, having paid his rent in full, had left property on the premises which was afterwards distrained for the tax during the time of his tenancy, he was obliged to pay it. And it was held that he might recover the same in an action against the landlord for money paid.

If a lease be made rendering rent free from taxes, this is a covenant to pay all taxes whatsoever which may be legally deducted from the rent. (*h*) It was however the object and the express enactment of the stat. 46 Geo. III. c. 65. s. 115. (the property-tax act) to make void all agreements between landlord and tenant, for the purpose of throwing that burthen, as far as the landlord was concerned, on the tenant. But where (*i*) the tenant covenanted to pay the property-tax, and all other taxes imposed on the premises; although such a covenant was void by the abovementioned statute, yet it did not avoid a separate covenant in the lease to pay the rent clear of all parliamentary taxes

(*f*) *Rich v. Jackson*, 4 Bro. Ch. C 521.
315. 6 Ves. 334. n. S. C.

(*h*) *Giles v. Hooper*, Carth. 135.

(*g*) *Dawson v. Linton*, 5 B. and A.

(*i*) *Gaskell v. King*, 11 East. 165.

generally, for such general words will be understood of such taxes as the tenant may legally pay. So on the same principle, where rent had been reserved clear of the property-tax, it was held that the reservation was void only as to the illegal part, and that it was a good reservation of the same rent subject to that deduction. (*k*)

Although all the land-tax acts empower the tenant to deduct it, yet we have seen that this is not held to control the agreement of the parties. And the same observation applies to all other rates and assessments: thus the commissioners of sewers have an election to charge the owners or occupiers; but this may be matter of private arrangement. So in the 57 Geo. III. c. xxix. passed for the regulation of the pavement in London, Westminster, and Southwark, together with the parishes of Marylebone and St. Pancras, the paving rates are directed in certain cases to be paid by the landlord, yet there is nothing in the act so peremptory as to control the private agreement of the parties; and there are local acts of the same kind elsewhere.

A covenant to pay taxes generally will include taxes subsequently imposed. So where (*l*) a lessee covenanted to pay all assessments, charges, and taxes whatsoever, towards or concerning the reparation of the premises, and a wall built in defence of the level after being thrown down by a tempest was rebuilt by order of the commissioners of sewers in a new shape; it was held that the covenant extended to the reparations of this second wall as well as the first.

The stat. 7 Geo. III. c. 37., passed for the purpose of encouraging the building of Blackfriars-bridge, by the 51st section, after enabling private persons to enclose and embank certain lands therein specified at their own expense, enacts that the ground and soil of the river Thames, so to be enclosed and embanked in the front of every such respective wharf or ground, should vest in the owners of such adjoining wharf or ground, free from all taxes and assessments whatsoever. In a case (*m*) arising upon this act the question was whether a house which had been built on land so recovered from the river, was liable to be assessed to

(*k*) *Readshaw v. Balders*, 4 Taunt. 57. *Fuller v. Abbott*, 4 Taunt. 105. *Tinkler v. Practice*, 4 Taunt. 549.

(*l*) *Commins v. Massam*, March. 196.

(*m*) *Williams v. Pritchard*, 4 T. R. 2.

the land-tax levied under an act (the stat. 27 Geo. III.) passed since that time. Lord Kenyon in delivering his judgment observed, that it could not be contended that a subsequent act of parliament would not control the provisions of a prior statute, if it were intended to have that operation: but there were several cases in the books to shew that where the intention of the legislature was apparent, the subsequent act should not have that operation there, even though the words of such statute taken strictly and grammatically would repeal a former act; and in such cases the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction. The court therefore held that the house was not liable to the land-tax imposed by the later statute. The next case (*n*) in the same book was decided nearly on the same principle. It was there held that the occupiers of such houses were not liable to be assessed to rates for lighting and paving under the stat. 11 Geo. III. c. 29. The distinction contended for in this case was, that the rates were personal: but Lord Kenyon said there was no foundation for the argument, that the occupiers of houses might be liable though the lands be exempted. If the lands themselves were exempted, so must also the houses built thereon.

In the subsequent case of *Perchard v. Heywood* (*o*) a question arose whether such houses were exempted from the payment of house and window duties imposed by the stat. 38 Geo. III. c. 40. It was an action of trespass against the defendant for breaking and entering the plaintiff's dwelling-house, and taking and carrying away the plaintiff's goods. The entry, seizure, and conversion, were made by the defendant under assessments regularly made, and under a warrant regularly granted by the commissioners authorized to act under the following acts, or some or one of them; viz. stat. 38 Geo. III. c. 40.; 38 Geo. III. c. 16.; 38 Geo. III. c. 81. Lord Kenyon, C. J. "This act of parliament (viz. stat. 7 Geo. III.) is to be considered as a contract between the respective parties, (the corporation of the city of London and the owners of the grounds within the limits specified in the act) notwithstanding it is (as many other acts of the same kind are) declared to be a public act; for it was brought in on the petition of the city of London. When the act passed, certain improve-

(*n*) *Eddington v. Borman*, 4 T. R. 4.

(*o*) 8 T. R. 468.

ments of the property on the banks of the Thames were in view ; and in order to encourage the scheme, the lands to be improved were to be exempted from certain local taxes. Of this nature was the land tax ; for that act imposes a general burden which is to be raised on the whole city ; and therefore *inter se* the corporation might agree that the owners of this property might be exempted from bearing their share of it : but it was not the intention of the legislature to extend the exemption further." The decision of the court in the previous case of Williams and Pritchard was pressed upon them : but Lord Kenyon said that he approved of that decision. " Though the land-tax," he observed, " was at the time of that decision in form only an annual act ; it had been considered in substance as a permanent act : for if each land-tax act had been treated as a separate act of parliament standing by itself, the gross inequality of that act which then obtained in different parts of the country would not have prevailed so long. But certain regulations having been made on a valuation in King William's time, that proportion had always been paid in several districts since that time on the ground, that the land-tax though renewed annually, was considered a perpetual tax ; and then indeed it was in fact become such. In deciding that case, therefore, the court were guided by the intention of the legislature, who did not mean to exempt the owners of the land in question from the land-tax of one year only, but from the land-tax in subsequent years. Then, if that decision did not affect this case, it seemed perfectly clear that the plaintiff was liable to pay the taxes in question." The last clause referred to in the stat. 38 Geo. III. removed all doubt : though even without that he should have been of opinion that the plaintiff could not recover in this case. The clause of the act alluded to was a provision at the end of the schedules A. and B., in the 38 Geo. III. c. 60. which after imposing the several rates, and making certain exceptions in particular cases (not including this) proceeds to say : " the said several rates and duties to be charged in respect of every inhabited dwelling-house, without any other or further exemption being allowed, than such as are contained and expressly provided for in and by this act, notwithstanding any former statute or statutes to the contrary." The counsel for the plaintiff contended, that this clause was introduced for the purpose only of guarding against any equitable extension of the exemptions contained in

the act itself. But Lawrence, J. said there was no foundation for this argument: for the act did not say that there should be no equitable construction of it; but enacted, in express terms, that there should be no other exemption than those particularly specified. The same learned judge had before observed that it could never have been the intention of the legislature to exempt the owners of those houses from such taxes as the present; for part of them were imposed in lieu of the tax upon tea, by the commutation act, and part instead of the tax on clocks and watches. The court delivered the *postea* to the defendant.

The poor's rate is not a tax upon the land, but a personal charge in respect of the present improved value of the land. (p) The farmer or occupier of the land is liable to the tax, and not the landlord; because it arises by reason of the occupation of land in the parish: and the landlord is never assessed for the rent, because that would be a double assessment in respect of the same land. (q) It is immaterial what interest the occupier has in the land, at will or by any other tenure: it is sufficient that the person rated be the actual occupier.

The parson or his lessee are occupiers of tithes, and must be rated for them: but if the tenant bargain for a retainer of the tithes of his own land, he is not the occupier, but merely the purchaser of them. (r)

The possessions of the crown are not rateable: but the occupier of a house belonging to the crown is so. (s) So, although it was held that stables rented by the colonel of a regiment, by the order of government for the exclusive use of his regiment, were not rateable, yet the owner was held liable. (t) So the lessees of St. Luke's Hospital were held not rateable, but the owner of the land is probably not exempt. (u) The ranger of a royal park is rateable, as such, for inclosed lands within the park, yielding certain profits: but not for herbage and pawnage, which do not yield any certain profit. (x) So quit rent and other casual profits of a manor are not rateable. (y) A corporate body aggregate is rateable. (z)

(p) *H. v. Skingle*, 7 T. R. 549.

(q) Stat. 43 Eliz. c. 2.

(r) *R. v. Lambeth*, 1 Str. 525.

(s) *R. v. Hardie*, 3 T. R. 497.

(t) *Lord Amherst v. Lord Somers*,
3 T. R. 372. *Rekernall v. Biggs*, 4
T. R. 6.

(u) *R. v. St. Luke's Hospital*, 2
Burr. 1053.

(x) *Lord Bute v. Grindall*, 1 T. R.
399. *Jones v. Maunsell*, Dougl. 302.

(y) *R. v. Vandervald*, 1 Bl. 312.

(z) *R. v. Gardner*, 1 Bott. 143.

It is said that the rate should be on persons in respect of visible property in the parish : the stock, however, of a farmer cannot be rated, because it is necessary for the management of a farm. (a) Houses are expressly rateable : but household furniture is not. (b) A house and engine for laiding cotton, which were rented together, and described as an engine house, were held to be rateable. (c) The engine was stated not to be fixed to the floor : but it was not stated that it was not fixed to some part of the house. And considering the nature of the thing, it must have been so ; for it was stated to have been worked by water ; and the force of the water would have displaced it, if it had not been fixed to the building. On the same principle a machine-house, for weighing waggons, is rateable as a machine-house. (d) The mere usage of a place not to rate personal property cannot control the general law.

It is a general principle that an estate, after having once paid the rate, cannot be rated again. Therefore where (c) a farmer was rated for the whole farm, it was held to be no objection to the rate, that a dairyman who rented under him a stock of cows, which were to be depastured upon the same land, was not rated for such dairy ; although it was stated in the case that the dairyman made a profit of the cows, independent of the profit made by the farmer. It was said, indeed, that the interest which a dairyman takes under such an agreement is a tenement in law, and is an interest in land by which he may gain a settlement, and that cannot be disputed. Neither could any objection be made if the dairyman, considering him only, and not the farmer, as the occupier of so much of the farm as the cows were depastured on, had been rated as such for it. The rate, however, upon the farmer for the whole included all the profits of the land, and the stock appertaining to it : and considering the cows as personal stock, distinct from the land, they were the personal stock of the farmer and not of the dairyman, and the dairyman only made a profit out of the capital of another. It would have been a different question if the farmer derived a profit from the stock kept on the farm unconnected with the management of the farm ; as if he kept a large stock of cattle for

(a) *R. v. Barkin*, 2 *Ld. Raym.* 1280.(b) *R. v. White*, 4 *T. R.* 775.(c) *R. v. Hogg*, 1 *T. R.* 721.(d) *R. v. St. Nicholas, Gloucester*,1 *T. R.* 723. n.(e) *R. v. Brown*, 8 *East.* 528.

sale, which he fed with oilcake, there he would be separately rateable for it, not as the stock of his farm, but as stock generally from which he derived a distinct profit.

Lead-mines are not rateable, nor any mines but coal-mines, which are expressly mentioned in the statute: (*f*) and it is inferred from thence that the others are exempt on the principle *expressio unius est exclusio alterius*. The reason seems to be that the risk of mining adventures is so great that the rate would discourage the adventurers altogether. The same reason, however, does not apply to the lord or landlord, who in case they do prove of value receives a certain stipulated benefit without any risk. Therefore, where (*g*) the lessee, as lord of the soil, was entitled to a duty called "lot," being the thirteenth dish or measure of lead ore got, dressed, and made merchantable, and to another duty called "cope," which was sixpence for every load or nine dishes of lead ore raised at such mines, it was held that the lessee was rateable for such lot and cope. So, on the same principle in another case, (*h*) a person entitled to toll tin and farm dues, which are certain portions of the tin raised by adventurers in tin-mines, was liable in respect thereof. So the lessee "of all the part, purpart, lot, and free-share of the lessor as lord of the manor, of and in all calamine stone raised," &c. was held to be rateable. (*i*) In these cases the toll or duty paid has been considered part of the solid mass of the land; and, therefore, assessable in the hands of the lord as occupier. (*k*) In the case of the Baptist Mill Company, it was made part of the judgment, that the adventurers and the lord did not stand in the relation of landlord and tenant; but that the adventurers were mere workmen. It is true that in *Rowls v. Gell* the mineral underwent some sort of process before it was delivered to the lessee of the soil: but that process did not alter in any degree its original and native character. The plaintiff was also rated for cope, which is described as a pecuniary payment: but no notice was taken of that circumstance in the judgment or argument; nor could it have been effectually taken in that form of action, *viz.* trespass on the case; for if he was rateable for lot, he would of course have some rateable pro-

(*f*) Stat. 43 Eliz. c. 2.

(*g*) *Rowls v. Gell*, Cowp. 451.

(*h*) *R. v. St. Agnes*, 3 T. R. 480.

(*i*) *R. v. Baptist Mill Company* 1 M. & S. 612.

(*k*) *R. v. Nicholson*, 12 East. 330. *Williams v. Jones*, *ib.* 346.

erty in the parish, and consequently his action would not have been maintainable.

So where (*l*) the owner of the soil by indenture granted to certain adventurers full and free liberty to dig, mine, and search for tin ore, &c. and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c. as they should think necessary, yielding and paying to him one full eighth share of all such tin, tin ore, &c. the same having been first spalled, picked, or otherwise made merchantable and fit to be smelted. And the indenture contained a power either for payment in ore, or the amount thereof in money; which had been acted upon: and the owner had received it in money. It was held that for this his one-eighth share he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being in the nature of rent.

The lessee of a coal mine is rateable, though he derives no profit from it; it is sufficient, if it be productive and continues to be worked: (*m*) but if the mine is so unproductive that it ceases to be worked, it is no longer liable to the poor. (*n*)

Iron mines are not rateable for the reason already given: (*o*) but lime works, (*p*) slate works or mines, (*q*) although attended with risk and expense, and yielding uncertain profits are so. The occupier of a claypit is rateable in the same way. So if one rent a quantity of land, together with a mineral spring arising out of it, at a gross rent, he is rateable to the poor in respect of the whole, although the value of the land, independently of the spring, amount only to one-fourth of the whole. (*r*)

Whether chambers in inns of court are rateable or not is undetermined: the fact of their being extra-parochial has been thought not to be a sufficient ground of exemption; because, if it were, it is said the poor of extra-parochial places would be deprived of the benefit of the statute which has been construed to extend to them. This does not appear to be a necessary consequence: but so far is certain, that if extra-parochial places are rateable, there is no legislative enactment at present in force, or

(*l*) *R. v. St. Austell*, 5 B. & A. 693.

(*m*) *R. v. Parrot*, 5 T. R. 596.

(*n*) *R. v. Bedworth*, 8 East. 387.

(*o*) *R. v. Cunningham*, 5 East. 478.

(*p*) *R. v. Alberbury*, 1 East. 534.

(*q*) *R. v. Woodland*, 2 East. 164.

(*r*) *R. v. Miller*, Cowp. 619.

other rule which determines what parish in particular in their neighbourhood has the right to assess them.

A common *quasi* common is certainly not rateable, because it is not the subject of occupation : but on an inclosure of wastes, on which the landholders have common appurtenant, the allotments given in lieu of such right may be assessed to the poor. (s) So by the statute 17 Geo. II. c. 37. waste lands improved and drained are rateable to the relief of the poor and all other parochial rates, of the parish nearest to such improved lands.

It seems, however, that in some cases commons may be assessed as accessory to the principal subject of occupation ; therefore, where the inhabitants of one parish had common appendant in certain waste grounds which lay in another parish, it was held that the commoner might be assessed for it in the parish where his farm lay ; for the common was incident, and might pass by the grant of the farm. (t)

A mere incorporeal fishery does not fall within the statute : but a fishery may be connected with the soil, and in that case it may be rated. (u)

The lessee of the tolls of a public bridge is not rateable as such whatever rent he may pay, if it appear that he has no visible property in the parish. Tolls *per se* are not rateable : but it would be otherwise if a toll-house were attached to the bridge where the lessee dwelt, or it could be proved that he received any profits to himself beyond the rent. (x) So the lessee of a ferry not being resident within the parish is not rateable : (y) for the meaning of the word "inhabitant" is one resident in the parish ; and all the cases in which persons have been rated in respect of the receipt of tolls apart from the question of habitancy have been where at the same time they occupied real visible property, connected with such tolls in the parish where they were rated. (s) The tolls of a light-house in a township, collected out of the township, of ships upon the coast are not rateable as tolls in the township. (a) But the tolls of a navigable canal are rateable in the parish where they become due, and not where they happen to be collected or received. (b)

(s) *Kempe v. Spence*, 2 Bl. 1245.

(t) *R. v. Fox*, 1 Salk. 169.

(u) *R. v. Ellis*, 1 M. and S. 682.

(x) *R. v. Byre*, 12 East. 416.

(y) *R. v. Nicholson*, 12 East. 330.

(s) *R. v. Cardington*, Cowp. 581.

Salter's load sluice case, 4 T. R. 730.

(a) *R. v. Tynemouth*, 12 East. 47.

(b) *R. v. The Aire and Calder Na-*

avigation, 2 T. R. 660. *R. v. The*

The word "inhabitant," as has been observed, means a resident within the parish; yet where (c) one went from home with his family for nearly a year, and left his assistant to carry on his business in one room of the house, which for this purpose was parted off, and left the key of the house door with a friend, and had the garden cultivated for his benefit, he was held liable to be rated as occupier of the whole house.

Although a man reside in another parish, yet it seems that if he have lands in the parish in his own manurance he may be rated for it: for by doing so he is a resident parishioner in law for this purpose. (d) But by *Holledge's case* (c) the lessee of a stall in a market town, who came there weekly to the market to sell his wares, was not rateable to the repairs of the church.

By the statute 59 Geo. III. c. 12. c. 19., after reciting that in many parishes, and more especially in large and populous towns, the payment of poor's rates is evaded by reason that great numbers of houses within such parishes are let out in lodgings, or in separate apartments, or for short terms, or are let to tenants, who quit their residences or become insolvent before the rates charged on them can be collected, it is enacted that the inhabitants of any parish in vestry assembled may direct that the owners or landlords who shall let their houses to the occupiers at any rent not exceeding the rate of 20*l.*, nor less than 6*l.* by the year for any term less than a year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the relief of the poor instead of the actual occupiers: but s. 20 provides that the goods of the occupier may be distrained for such rates to the amount of the rent actually due, and they may deduct such rates out of their rent. By s. 21. every person reserving or claiming the rent of any such house, apartment or dwelling for his or her own use, or receiving the same for the use of any corporation aggregate, or of any landlord who shall be a minor under coverture or insane, or for the use of any person who shall not be usually resident within twenty miles of the parish in which, &c. shall for this purpose be deemed the owner. By s. 23. it is provided that in places where the right of voting for

Mayor and Corporation of London,
4 T. R. 21. *R. v. Cardington, Cowp.*
581. *R. v. Staffordshire and Worces-*
ter Navigation, 8 T. R. 340. *R. v.*

Page, 4 T. R. 543.

(c) *R. v. Aberystwith*, 10 East. 354.

(d) *Jeffrey's case*, 1 Bott. 122.

(e) 1 Bott. 123.

members of parliament depends on the rating, owners not being occupiers shall not be so rated.

Timber is rateable ; and if beech be so considered by the custom of the country, it may be presumed to have been so before the statute 43 Eliz., and therefore is rateable as timber. (*f*) Saleable underwood is rateable in proportion to its value, although it should not happen to be cut down more than once in twenty-one years ; and its annual value may be estimated according to the value of a rent on a lease of them for the duration of their intended growth. But in general the owners of this kind of property are in the habit of cutting certain portions every year. (*g*)

If A. has an exclusive right of using a wayleave over land which he holds in common with B., paying B. a yearly certain sum, and also has the privilege of using a wayleave occupied by C. paying so much a ton for all goods carried over it : A. is not rateable for either wayleave. It is a bare licence, and the soil does not pass ; it is an easement and no grant of the profits. One of the leases, indeed, granted a power to make new ways : but, as the lessee made no new way, the soil did not pass. (*h*) But where (*i*) A. having granted to B. a lease for years of wayleaves for the purpose of carrying coals, and the liberty of erecting bridges and levelling hills over certain lands, and B. made waggon ways and inclosed them, thereby excluding all other persons, erected bridges, and built houses for his servants ; B. was held rateable for the ground called the waggon way.

An act of the 48 Geo. III. having vested the aftermath of a certain meadow in trustees, in trust for the burgesses, &c. of Tewksbury, discharged of all other interest in the same, with power to let the same or any part or parts thereof annually to any person or persons for the best rent ; and also to let it in pastures for horses, cattle, and sheep, to different persons at such rates and subject to such regulations as the trustees should appoint, or by writing under their hand and seal to demise the same for a term of years, &c. And having provided that the rents and profits should after payment of all charges be divided by the trustees among the objects of the trust. It was held that the trustees having let it out in pastures at so much a head for horses, &c. to various persons,

(*f*) *R. v. Minchin Hampton*, 3 Burr. 1309.

(*h*) *R. v. Jolliffe*, 3 T. R. 90.

(*i*) *R. v. Bell*, 7 T. R. 598.

(*g*) *R. v. Mirfield*, 10 East, 219.

must themselves be considered the occupiers, and rateable for the same. (*k*)

The question of paying rates as between landlord and tenant may deserve consideration in another point of view, namely, with reference to the law of settlement. The payment of rates is a mode of gaining a settlement, because it is evidence against the parish that they consider the person paying as able to pay them. The party paying, must be assessed and rated; (*l*) and such assessment is sufficient notice in writing to the parish, although he be not named by his right name. (*m*) And an assessment and payment of a poor's rate, by the tenant, will gain a settlement, although the landlord has privately agreed to pay them. (*n*) Where (*o*) however, a farm was rated, and the landlord paid the rate, and was allowed it by the tenant, it was held that the tenant did not gain a settlement; because it was stated that the overseer did not know that he resided there.

By stat. 35 Geo. III. c. 101., no person after the passing of that act, who shall come into a parish, can gain a settlement by being rated to any tenement under the value of 10*l.* a year; and the words "who shall come" have been considered as meaning "who shall inhabit," so that the operation of the act extends to all persons who were in such parishes at the time of passing the act. (*p*)

Payment by one assessed to a church rate on householders only, and not on parishioners generally, will gain a settlement; for it is no less a public tax, and it is paid within the parish, which is all that is required by the stat. 3 W. III. c. 11. s. 6. (*q*)

Under a covenant (*r*) by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being deducted, and further that he would pay all further and additional rates on the premises, or on any additional buildings or improvements, made by him and the landlord, covenanted to pay all rates on the premises, or on the tenant in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises, the tenant is bound to defray all increase of the old as

(*k*) *R. v. Tewksbury*, 18 East. 155.

(*l*) *R. v. Bovindon*, 3 Str. 1023.

(*m*) *R. v. Painswick*, 1 Burr. 621.

R. v. Bramley, Cas. temp. Hardw. 310.

Stat. 3 and 4 W. and M. c. 11. *R. v.*

King's Fare, 1 Barn. 407. *R. v. Mal-*

den, Carth. 28.

(*n*) *R. v. Openshaw*, 1 Bl. 463.

(*o*) *R. v. Llangamparch*, 3 T.R. 523.

(*p*) *R. v. Inlington*, 1 East. 283.

(*q*) *R. v. St. Bees*, 9 East. 203.

(*r*) *Graham v. White*, 16 East. 28.

well as any new rates beyond the proportion at which the premises were rated at the time of the deed.

6. Tithes are an imposition which must be paid by the tenant, if nothing appear to the contrary ; neither can the lessee claim to be discharged of tithes under any covenant with his lessor : (s) but there is no objection to the lessor covenanting for the enjoyment of land discharged of tithes. (t)

The lessee of the vicar's lands must pay tithes to the *lay impropriator*, although in the hands of the vicar they were exempt. (u) So if one take a lease by deed of his own tithes, or farm the tithes of the parish, and lease land of his own, the lessee must pay tithes to the lessor. (x) If, however, a spiritual person prescribe *in non decimando*, which it is agreed a spiritual person may, the prescription will also discharge the lessee. (y)

Lands which formerly belonged to the Cistercian order are exempt, in the hands of tenant in fee simple : but they become liable to pay tithes, if leased for life or years. (z) This is by force of the stat. 2 Hen. IV. c. 4 : but such privileges as then existed are valid.

Lands of the order of St. John of Jerusalem, which came to the crown by force of the stat. 32 Hen. VIII. c. 13, for the dissolution of monasteries, are exempt in the hands of the grantee of the crown, and (it seems also) in those of his lessee. (a) So where the globe of an impropriate rectory was discharged of small tithes at the time of the dissolution of the priory, to which it was annexed, it will also be so discharged in the hands of the King's patentee and his lessee. (b)

Abbey lands after the dissolution of monasteries were discharged from tithes, as they had been before the dissolution, by stat. 31 Hen. VIII. c. 13. s. 21. ; and the Irish stat. 33 Hen. VIII. stat. 2. c. 5. s. 25 is *in pari materia*.

The most usual division of tithes is into three classes, prædial, mixed, and personal. Prædial *quidquid oritur ex prædiis*,—corn,

(s) *Brewer v. Hill*, 2 Anstr. 413.

475, 511.

(t) *Lanning v. Lovering*, Cro. Eliz.

(u) 1 Brownl. 44.

916.

(x) *Harris v. Cotton*, 1 Brownl. 69.

(z) *Toller on Tithes*, 175.

(y) *Booth v. Franklin*, Heel. 51.

(b) *Mineo v. Marston or Barkdale*, Cro. Eliz. 479, 575.

(y) *Wright v. Wright*, Cro. Eliz.

hay, turnips, clover, hops, saffron, and other produce of the earth, of which every crop is titheable, whether there are more than one in a year, or whether a crop come to maturity in a longer period than a year.

In the wealds of Kent and Sussex *sylva cædua* is exempt by custom, and the same prescription may be made for other counties or hundreds. (c) In all other places, copsewood, and underwood, (*hautbois* and *sousbois*) are titheable at common law. *Grosbois*, or timber above twenty years is exempt by the stat. 45. Edw. III. c. 3 : but oakwood (called sometimes black poles) being the germens growing from old stools of trees, which, before they were cut, were of more than twenty years standing, are not privileged as *grosbois*. (d) When trees are exempt, no tithe is payable for the bark, tops or lops. (e)

Wood, however, which is cut down to fence corn or other titheable matter, or for hop-poles, and in general for the purpose of agriculture and husbandry, is not titheable. So firewood cut and consumed in a dwelling-house in the parish is not titheable. (f)

Nurserymen and the occupiers of garden ground, it seems, must pay tithes for young trees, pine-apples, and other exotics : but in these cases there is usually a composition made. (g)

By the stat. 11 and 12 W. III. c. 16. the tithe of hemp and flax is ascertained at the rate of 5*l.* an acre : but this act does not affect lands previously discharged by a modus. In Ireland, the tithe of hemp is ascertained in the same way : but no act has defined the tithe payable there for flax.

Of mixed tithes, such as milk, wool, young animals, and agistment cattle, little need be said ; as they do not materially affect the contract between landlord and tenant : but personal tithes seem to require some observations, although now they have fallen greatly into disuse. By the stat. 2 and 3 Edw. VI. c. 13. s. 7. (h) the tenth part of the clear gains of any trade or employment is payable, but day-labourers are exempt ; and

(c) Toll. tithes, 99. Nagle v. Edwards, Gwill. 1442. Mantell v. Pain, Gwill. 1509.

(d) Ford v. Racster, 4 M. and S. 136. Walton v. Tryon, 6 Bac. Abr. 721. Soby v. Molins, Flow. 470. Turner

v. Smith, Gwill. 529. See Evans's stats. 279. n.

(e) Walton v. Tyrer, Gwill. 818.

(f) Toller on tithes, 113.

(g) Toller on tithes, 124.

(h) No similar Irish stat.

it has been determined (*i*) that an innkeeper is not chargeable with them, in respect of the gain made by the sale of wine and beer. Perhaps the only species of personal tithes now payable are those of mills and fish. The stat. 2 and 3 Edw. VI. confines the payment of personal tithes generally to such persons and places by whom and in which the same have been accustomedly used, or ought to have been made, or ought to have been made within forty years before that act. But a different rule is adopted as to mills: mills more ancient than the 9th Edw. II. are by the stat. of *Articuli cleri*, c. 5, impliedly discharged of tithes. If such a mill be rebuilt on the old foundation, the exemption shall revive: (*k*) but if the materials of an old mill are employed in erecting a new one on a different scite, though on the same stream, personal tithes are due, which amount to the tenth of the miller's profits over and above all incidental charges, including the rent. (*l*) So all newly built mills pay tithes by force of the stat. *Articuli cleri*, which controls the stat. 2 and 3 Edw. VI., as to mills. (*m*) Where, (*n*) however, the date of a mill's erection, is unknown, and no proof is adduced of tithes ever having been paid, the court will presume it to be more ancient than the stat. *Articuli cleri*. Such tithes are payable where the premises are situated. (*o*) The preceding observations only relate to water-mills or windmills for grinding corn or grain. If such a mill, exempt from its real or supposed antiquity, is converted into one of a different description, and afterwards reconverted to its primitive use, it does not lose its privilege. (*p*) All other mills, such as fulling mills, unless perhaps by special custom, glass-houses, paper-mills, and the like, pay no personal tithes. (*q*) Easter offerings seem to be at the present day some, though very inadequate, compensation for personal tithes. Fish is the other article which is liable to this duty: but a special custom seems requisite to support such a tithe; and where they are kept in a pond for pleasure, the allegation even of a custom will not make them titheable. (*r*)

(*i*) 2 Bulstr. 141.

(*k*) *Ansell v. Adman*, Gwill. 130.

(*l*) *Hall v. Machet*, Gwill. 1460.

(*m*) *Thomas v. Price*, Gwill. 871.

See *Moore v. Russell*, Gwill. 355,

(*n*) *Hughes v. Bellinghurst*, Gwill.

(*o*) *Toller on tithes*, 46.

(*p*) *Wilson v. Mason*, Gwill. 974.

(*q*) *Johnson v. Dandridge*, Gwill.

354. 3 Atk. 19.

(*r*) *Anon.* Gwill. 428. *Flower v.*

Vaughan, Hott. 147.

By the 2 and 3 Edw. VI. c. 13. s. 5., which amends the statutes 27 Hen. VIII. c. 20., and 32 Hen. VIII. c. 7., all such barren, heath or waste ground, other than such as were discharged from the payment of tithe by act of parliament, which before that time had laid barren, and paid no tithe by reason of such barrenness, and then were or thereafter should be improved and converted into arable ground or meadow, should after seven years next after such improvement fully ended, pay tithe for the corn and hay growing on the same, provided that if such ground had before that time been charged with the payment of any tithes, and the same were improved, &c., the owner thereof should during the same seven years pay such kind of tithe as was paid before the said improvement. Land which, from its exposure, would not bear a crop without a stonewall to protect it from the climate, has been considered exempt under this act; (e) and, in general, the enquiry must be whether the land is of such a nature as to require extraordinary expense, either in manure or labour, to bring it into a proper state of cultivation. Sterility *ex vi termini* means an ungrateful soil.

And with the same view of promoting agriculture, and the improvement of barren land, the stat. 5 Geo. II. c. 9. s. 6. Irish, provides that all barren heath, and moory ground, mountain, bog, moss, and land taken in and enclosed from the sea, or any lough or river which by means of drains, banks, walls, or dykes, shall be improved and converted into arable or meadow land, shall be exempted from the payment of tithes for any hemp, flax, or rape growing thereon during seven years next after the improving and taking in thereof: provided such land did not at any time before such improvement pay tithes for any corn, hay, hemp, flax, rape, or potatoes. And by sect. 8. no land is discharged from paying for tithe such sum as the said land paid for any one of the preceding seven years.

By stat. 37 Hen. VIII. c. 12. it is provided that the inhabitants of London shall pay 2s. 9d. in the pound in lieu of tithes: but wherever less has been paid, the payment shall be according to the accustomed rate. Such customary payment need not be immemorial: but only such as might have acquired the character of a customary payment in the ecclesiastical court with respect to

(e) *Warwick v. Collins*, 2 M. & S. 340.

tithes. (t) After the fire of London, the tithes of the parishes affected by it were regulated by stat. 22 and 23 Car. II. c. 15. (u)

7. Besides the points already mentioned there are many others which require consideration in the framing of leases, with reference, more particularly, to local situation. A covenant, for instance, to restrain the exercise of particular trades is not uncommon; and, with respect to the trade of a butcher, it has been determined that a covenant not to exercise that trade generally will restrain the selling raw meat by retail, (x) although no beasts are slaughtered on the premises.

It may be useful likewise to mention in this point of view the stat. 14 Geo. III. c. 78., although a local act. It is commonly called the building act; and includes the cities of London and Westminster, the parishes of St. Marylebone and St. Pancras, and St. Luke's, Chelsea. Its main object was to provide against the frequency of fires, by building party walls according to the regulations of the act. By sect. 61. it is provided that the person or persons at whose expense any party wall shall be built agreeably to the directions of the act shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party wall. Upon this section it has been determined that if there be only one rent, that the landlord, and not the lessee, is the owner of the improved rent; although the lessee may have improved the premises. (y) The intention of the statute was to throw the burthen on persons to whom leases have been granted with a view to the improvement of the estate, who afterwards let them at a considerable increase of rent. (z) So also if a lessee at rack rent underlease at an advanced rent, this is also an improved rent within the meaning of the statute. (a)

(t) The warden and minor canons of St. Paul's v. Kettle, 2 Ves. and B. 13. Williamson v. Gosling, Gwill. 902.

(u) As to St. Bride's improper tithes, see stat. 4 and 5 Ann. c. 27. See also the stat. 44 Geo. III. lxxxix. increasing the tithes of certain parishes.

(x) Doe d. Gaskell v. Spry, 1 B. & A. 617.

(y) Southall v. Leadbetter, 3 T. R. 458. Beardmore v. Fox, 8 T. R. 214. Lambe v. Hemans, 2 B. and A. 467. Stuart v. Smith, 2 Marsh. 436. Taylor v. Reed, 6 Taunt. 249. Taylor v. Reed, 6 Taunt. 249.

(z) Peck v. Wood, 5 T. R. 130.

(a) Sangster v. Birkhead, 1 B. and P. 303.

But in this, as in other cases, the general law may be controuled by the agreement of the parties. Therefore where (b) the tenant of a house covenanted to pay a reasonable share and proportion of the expense of supporting, repairing, and amending all party walls, and to pay all taxes, duties, assessments and impositions, parliamentary and parochial, it being the intention of the parties that the lessor should receive a net sum of 60*l.*, without any deduction whatsoever; it was held that the tenant was bound to pay the expense of a party wall built according to the provisions of the building act.

No such obligation arises upon the general covenant to repair. In the case of *Moore v. Clarke* (c) Mansfield, C. J. delivered the judgment of the court; and, after observing that the act in question was not very easy to be understood in all its parts, said that, with respect to the act, every thing which is done in rebuilding a party wall passes or ought to pass between the landlord of one house, and the owner of the adjoining house. The act directs that when the wall requires repair, he who requires it shall give notice to the owner of the adjoining house. If the two landlords agree, then they may proceed to rebuild: if not, the surveyors are to be called in, and the judgment of those surveyors is to decide what is to be done with that party wall. This introduces instead of a jury a new judicature, as to the building of the party wall. All the expenses of building it arise in the case where the two cannot agree from the new judicature of the surveyors: but the tenant is bound by his lease only to pay such damages for want of repairs as a jury shall assess. He has nothing to do with the expense which the two landlords create by agreement, or the surveyor by assessment: it would be a monstrous hard thing if he should be bound by the judgment of the surveyors to which he has no opportunity of saying any thing. It would be much harder if he should be bound by the mere agreement of two landlords; or, as in this case, by the will of one landlord.

If a person during the building of a party wall make an agreement for a building lease which is afterwards executed, he may be considered the owner of the improved rent: (d) but if the tenant rebuilds a house without a lease or agreement for a lease, and therein makes use of the party wall of the adjoining

(b) *Barrett v. The Duke of Bedford*,
8 T. R. 602.

(c) 5 Taunt. 99.

(d) *Peck v. Wood*, 5 T. R. 130.

house, he cannot be sued for half the cost as owner of the improved rent, though he afterwards obtains in consequence of rebuilding a beneficial lease at a low ground rent *habendum* from a day before the rebuilding. The mere possession of the house did not make the defendant owner of the improved rent, and no agreement could be inferred from the circumstances. (e)

If the tenant agree with the owner of the adjoining house that he shall build a party wall, and that he will pay what is fair and reasonable, this is a private agreement, and he will be liable for his share of the expense. (f) In this case Gibbs, C. J. observed that, independently of the agreement, it was in evidence that the defendant had offered his lease to sale, and asked 300*l.*; and it had been held that persons in cases not very dissimilar to this were the owners of the improved rent, and therefore his lordship said he was not clear that the defendant was not legally liable to the price. There does not however appear to be any decision to the effect stated by Lord C. J. Gibbs. The learned judge probably had in his mind the *dictum* of Lord Kenyon in *Southall v. Leadbetter*; (g) *vis.* that if the original lessee sold his interest for a large sum in gross, he would be liable within the act, though no improved rent were reserved to him.

8. Difficulties will sometimes arise upon the nature of covenants, whether they are joint, or joint and several, or several. The correct rule seems to be, that by express words a covenant may be joint, or joint and several, though the interest is several; and *vice versa* that it may be several, though the interest be joint. (h) But if the words are left to the interpretation of law, the construction of law is, that the covenant upon a joint demise is joint, and in that case the covenant in law will not extend to charge all with the tortious acts of one. (i) So if the interest is several, the law will make the obligation of the covenantors several. It has however been held by very great authority, that if several persons covenant severally in respect of a joint interest, the covenant will be joint notwithstanding, because the wording of a covenant cannot make that several which before was joint. (k) So in a late-

(e) *Taylor v. Reed*, 6 Taunt. 249.

(h) 1 Saund. 154. n.

(f) *Stuart v. Smith*, 7 Taunt. 158.(i) *Coleman v. Sherwin*, Carth. 97.

(g) 3 T. R. 458.

(k) *Johnson v. Wilson*, Willes 248.

case, (l) Sir V. Gibbs assumed, that all covenants must be joint or several according to the interest, notwithstanding express language indicative of a contrary intention in the parties. This doctrine, however, would militate against the existence of joint and several covenants, in which case it has been generally held that the covenantors may be sued either jointly or severally. (m)

If several joint lessors covenant against incumbrances by them or any other person, this goes to incumbrances by them severally as well as jointly. (n) And where there were three joint lessees, and one died, it was held to be in the election of the lessor whether he would join the representative of the one who died in an action against the survivors. (o)

In an indenture (p) of the demise of a colliery, the lessees covenanted "jointly and severally in the manner following, viz. &c." and then followed a string of covenants regarding the working of the colliery, in all of which the lessees covenanted jointly and severally, and then came a covenant "that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c." without adding "and each of them." This was also held to be joint and several by reason of the introductory words.

With respect to the remedy of the covenantees, a covenant with two and every of them is joint, although they are several parties to the deed : but a joint and several covenant with several covenantees is joint only where the interest is joint, and several where the interest is several. (q)

The word separately will make a separate covenant, though the covenant on the other side be joint : (r) but a covenant with A., his executors, administrators and assigns, and with B. and her assigns, although for the benefit of A. only, is joint, and the right of action survives to B.; for the principle is to avoid a multiplicity of actions for the same duty. (s) If indeed the covenant had been by several deeds, there could have been no

(l) *James v. Emery*, 5 Price 533.

Woodward, 1 Freem. 245.

(m) *Enys v. Donnithorne*, 2 Burr. 1190.

(q) *Eccleston v. Clipsham*, 1 Saund. 153.

(n) *Sanders v. Meryton*, Poph. 200.

(r) *Mathewson's case*, 5 Rep. 22.

(o) *Trevor v. Nurse*, 2 Keb. 44.

James v. Emery, 2 B. Moor. 195.

(p) *The Duke of Northumberland v. Gunayton*, 4 T. R. 522. May v.

(s) *Anderson v. Martendale*, 1 East.

497.

joinder of action : but it was held that no distinction arose from the omission of the words "executors and administrators," because they were included in the word "assigns." (t)

Wherever the words of an agreement can be collected to do or omit doing any thing, the law construes it to be a breach of covenant, if the agreement is under seal. We have seen many instances of this in the course of the present chapter. Thus, if the lessor reserve to himself a right to cut timber, making a reasonable reparation for the damage occasioned thereby ; this amounts to a covenant to make a reasonable satisfaction. It may be remarked, however that an action of covenant will not lie on these words for the tortious act of a stranger without the consent of the lessor, however he may countenance it afterwards. (u) So where (x) there was a covenant by the lessor that the lessee might cut firebote, &c. without doing waste, and the lessee did waste ; this was a breach of the lessee's agreement, and he was held liable to be sued on a bond for the performance of covenants, &c. ; for, though it was the covenant of the lessor, it was the agreement of the lessee.

Again where (y) the lessee covenanted that he would at all times sow, manure, and cultivate the premises, except the rabbit warren and sheep-walk ; the words "except the rabbit warren and sheep-walk," being tantamount to "but not, &c." amounted to a covenant not to plough the warren and sheep-walk ; which were not in their own nature proper subjects for cultivation.

So it was held that an action of covenant lay on the demise of a coal-mine, whereby it was recited that, before the sealing of the indenture, it was agreed that the plaintiff should have the third part of the coals, which recital was afterwards confirmed by the indenture.

So where (z) Queen Elizabeth leased a water-mill, and in the letters patent were these words, "*et prædictus A. executores et assignatores sui prædictum molendinum reparabunt,*" this was held to amount to a covenant as much as if the lease had been by indenture, because the patentee accepted it.

If the lessee covenants to do a thing which implies a previous

(t) *Newton v. Osborne*, Styl. 387. Ellis, 16 East. 352.

Dy. 14. a.

(z) *Barfoot v. Treswell*, 3 Keb. 465.

(u) *Griffiths v. Brome*, 6 T. R. 66.

(a) *Bret v. Cumberland*, Cro. Jac.

(s) *Stevenson's case*, 1 Leon. 457.

399, 521. *Lord Ewre v. Strickland*,

(y) *The Duke of St. Albans v.* Cro. Jac. 240.

act, to be done by the lessee, without which the covenant would be nugatory, the law will imply a covenant to do such previous act. Therefore where (b) there was a covenant by the lessee, that he would at all times and seasons of burning lime supply the lessor and his tenants with lime, at a stated price, for the improvement of their lands, and the repair of their houses: it was held that there was an implied covenant to burn lime at all seasons. So where (c) there was a stipulation that the tenant should fold his flock on those parts of the premises where the same had been usually folded, under a penalty of 5*l.*, the court held that this covenant bound the tenant to keep a flock of sheep on the premises, as well as to fold them. Where, (d) however, the lessee covenanted to permit the lessor, in the last year of his tenancy, to sow clover amongst the lessee's barley, it was held that this did not imply that the lessee would give the lessor notice of his intention to sow: it was sufficient if he was not prevented from doing so.

Where parties use uncertain terms, the court is in general guided by the grammatical construction of the words in interpreting covenants as well as all written instruments. Therefore it has been held that a covenant for a newly intended road will not apply to a road which, when the parties contracted, was newly intended to be made; but was completed before the parties sealed the deed. (e)

If the sense of the words be *in equilibrio*, the maxim of law applies, namely, "*verba chartarum fortius accipiuntur contra proferentem*:" therefore, where (f) the words of a covenant were, "that the tenant should not at any time during the term cut down any of the coppice, growing upon the premises, of less than ten years' growth, or at any unseasonable time of the year, or in an unhusbandlike manner; but at the expiration of the lease the landlord agreed to pay the tenant the value of all such growth of coppice as should be then standing and growing:" the court thought that the landlord was bound to pay the tenant for the value of all the coppice, of less than ten years' growth, left standing on the demised premises at the end of the term, although no

(b) Lord Shrewsbury v. Gould, 2 B. & A. 487.

(c) Webb v. Plummer, 2 B. & A.

77.

(d) Hughes v. Richman, Cowp. 125.

(e) Crisp v. Price, 5 Taunt. 548.

Clifton v. Walmsley, 5 T. R. 564.

(f) Love v. Pares, 13 East. 80.

special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such of the coppice which the tenant was not entitled to cut. Mr. J. Le Blanc differed from the rest, and thought the covenant did not admit of so much doubt. This, he observed, was a Michaelmas holding; and the tenant would accordingly leave the estate at Michaelmas; and he took it that, according to the usual course of coppice land, there would be at every Michaelmas some portion of the coppice standing of the growth of ten years: but the proper time for cutting it would not arrive till after the lease was expired. To this state of things, he thought, the covenant was meant to apply. The tenant was restrained from cutting coppice of less than ten years' growth, or at any unseasonable time of the year: but, at the expiration of the term, the landlord agreed to pay the tenant the full value of all such growth of coppice as should then be standing, and which the tenant might cut at the seasonable time of the year.

In many cases of ambiguity the subject matter of the lease is a guide of construction. Thus the word "insured" and "keep insured" in a lease of houses and buildings, naturally means an insurance against fire. (g) So where (h) in a lease, whereby in consideration of 200*l.* to be laid out in rebuilding, &c. and other covenants, the lessor demised all the premises; the lessee covenanted to lay out the said sum of 200*l.* within fifteen years in erecting and rebuilding messuages or tenements, or some other buildings on the ground and premises; and from time to time and at all times, all and singular the messuages, &c. to be erected, with all such other houses, edifices, &c. as should at any time or times thereafter be erected, &c. to repair: and the said demised premises with all such other houses, &c. so well repaired at the end or other sooner determination of the term, to deliver up, &c. As this was a building and repairing lease, the court thought it was manifest that no part of the 200*l.* should be laid out on the old buildings, but that they were intended to be pulled down; and that whatever the lessee should erect with the said sum of 200*l.*, or for his own convenience, should be kept in repair.

(g) *Dee d. Pitt v. Sherwin*, 3 Campb. N. P. C. 134.

(h) *Lant v. Norris*, 1 Burr. 267.

In conclusion it may be observed that the mutual covenants between the lessor and lessee are in general independent covenants, and the non-performance on one side is no excuse for a default on the other. (i) But each has his own remedy on every breach of covenant; therefore, it has been determined that if there be an express covenant for rent an action will lie, although the lessee cannot enjoy the premises by the default of the lessor; as, for instance, in not rebuilding when it was his duty to do so. (k) And even when the covenant was, "that the lessee paying the rent and performing the covenants should enjoy," it was held not to be a "condition, but merely in covenant." (l)

So where (m) the lessee of a public-house, covenanted to buy of the lessor all the malt he should brew into ale or beer, or otherwise use therein; and the lessor covenanted to deliver on request sufficient, good, well dried, marketable malt, for the use of the defendant in the demised premises; and that at the market price; but, if the lessor should neglect to do so, the lessee might purchase of others: these were held to be independent covenants, and each party must resort to his own covenant. So again where there was a demise excepting trees, and the liberty of carrying them away; the lessor repairing the hedges and filling up the holes caused by taking them away: these were independent covenants; and therefore, if the lessor be prevented from carrying away the trees when cut, it is no answer to say that he did not repair or fill up the holes; but the lessee's remedy is on the covenant. (n)

Where a grant is void, or becomes void by the act of law, or if the party, all covenants which are immediately dependent on the grant, or to which the validity of the grant is a condition precedent, are likewise void. Such are the covenants for rent and repairs on the part of the lessee; and the covenant for quiet enjoyment on the part of the lessor. (o) But covenants which are intended to obviate any objection to the lessor's title are not dis-

(i) See *Boone v. Eyre*, 1 H. Bl. 273.
Jones v. Barkley, Dougl. 684. *Porter v. Sheppard*, 4 T. R. 665. *Glazebrook v. Woodrow*, 8 T. R. 366.
Havelock v. Jeddies, 10 East, 555.
 (k) *Monk v. Cowper*, 2 Atk. 763.
See Allen v. Babington, 2 Keb. 9, 23.
Hayes v. Bickerstaff, Vaugh. 118.

(l) *Hayes v. Bickerstaff*, 2 Mod. 35.
Freem. Rep. 194. *Anon.* 4 Leon. 50.
 (m) *Weaver v. Sessions*, 6 Taunt. 154.
 (n) *Warren v. Arthur*, Tho. Jon. 205.
 (o) *Caponhurst v. Caponhurst*, Tho. Raym. 27. *Soprani v. Skurro*, Yelv. 18.

charged by eviction. (p) So a covenant to do any collateral act, being an independent covenant is not affected by the invalidity of the principal contract, although contained in the same deed. (q)

Covenants may also be discharged by the covenantee changing the nature of the subject matter of the covenant ; as where a mill had formerly been worked by the labour of men, and the lessors covenanted to supply eight men, out of a Bridewell prison, to work it ; and that if they did not do so, the lessee might retain 8*d.* a day for each man *toties quoties* : this covenant was held to be discharged by the lessee's converting the mill into a mill to be worked by horses. (r)

Covenants may be released by the agreement of the parties : but, since they are under seal, the release must be likewise under seal.

In former times it was not unusual for the lessee to enter into a bond for the performance of the covenants in a lease : these bonds extended to implied as well as express covenants ; (s) but were only a security to the amount of the penalty. (t) They are now not very common : but the tenant frequently binds himself in a specific sum to do some act relating to the land, as, for instance, to repair within a certain time, by the same instrument as the demise. (u) In these cases the only difficulty which has occurred is, whether such a sum should be considered as a penalty, or as liquidated damages. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be payable on the breach of performance, it has been thought that it ought to be considered as a penalty. But when it is agreed that if a party do not a particular thing a certain sum shall be paid, then the sum may be treated as liquidated damages.

In *Aylett v. Dod*, (x) and several other cases, it was laid down by Lord Hardwicke that where there is a clause of *nomine pœnæ* in a lease, to prevent the breaking up and ploughing old pasture ground ; the intention is to give the landlord some compensation for the damage sustained ; and, therefore, in that case, the whole *nomine pœnæ* shall be paid.

(p) *Walter v. The Duke of Norwich*, Owen 136. *Northcote v. Underhill*, 1 Salk. 199.

(q) *Ford v. Holburrow*, Ow. 104.

(r) *City of London v. Graham*, Cro. Jac. 182. Moor 879.

(s) 9 Ves. 330.

(t) *White v. Sealy*, Dougl. 49.

(u) *Edwards v. Williams*, 5 Taunt. 247. *Astley v. Weldon*, 2 Bos. & Pull. 350.

(x) 2 Atk. 328.

In *Rolle v. Peterson* (y) the tenant having covenanted that, in case any part of the premises that had not been in tillage within twenty years, should be converted into tillage, he would for the remainder of the term pay the further yearly rent of 5*l.* for every acre so converted; and having converted into tillage a parcel of land before covered with furze, an action was brought against him for this and other breaches of covenant; and 300*l.* damages were recovered upon a judgment by default. Lord Camden directed an issue of *quantum damnificatus*, ordering that the damages upon each breach of covenant should be found separately. Upon appeal to the House of Lords in opposition to the argument, that the damages were increased to so high a sum by means of the covenant to pay the increased rent, which was to be considered as a penalty, and that a court of equity could relieve against it: it was said not to be a penalty, but a liquidated satisfaction, fixed and agreed upon between the parties, and was reserved as an additional rent; whereas a penalty is a forfeiture for the better enforcing a prohibition, or a security for doing some collateral act. On the other side it was said that these rigorous covenants, though seemingly made in preservation of estates, are in effect a new mode of raising rents more oppressive than the proceeding by ejectment; and are not in the nature of a contract; but of a penalty for vindictive damages; and, therefore, ought to receive no countenance in equity, as the penalty thereby reserved frequently exceeds the value of the inheritance. But the decree was reversed.

A lease for lives was made in Ireland, at the yearly rent of 125*l.* with a clause, that if the tenant and his heirs with all their family did not reside on the premises during the lease, the rent should be raised to 150*l.*; an action at law having been commenced on the clause, the Court of Exchequer in Ireland granted an injunction. Upon appeal to the House of Lords it was argued, in support of the decree, that the covenant being inserted only for the sake of improvement, and to secure the rent reserved, the same had been substantially performed and the design thereof answered, for it was admitted that the lands were kept well stocked with more than sufficient to answer the rent: but the decree was reversed. (z)

(y) 6 Bro. P. C. 460.

407. See Evans's *Statutes* Pt. IV.

(z) *Ponsonby v. Adams*, 6 Bro. P. C. Cl. 12. No. 21. n. 4.

In the case of *Wood v. Avery* (a) a bond was conditioned for sustaining and maintaining a house in sufficient repairs, and so to leave it at the end of the term. At the time of the entry into the bond, the timber of part was so rotten that it was impossible to sustain it; and, therefore, the lessee took that part down, and rebuilt it in the same place, and of the same dimensions as before: and the court held, that if it had been an action of waste, the plea might have been good; but, here where he had bound himself to an inconvenience, he must provide for it at his peril. It seems, however, to be clear that, such a bond could not be put in force at the present day without shewing some special damage.

IX. Besides the security of covenants to enforce the performance of the contract, it is not unusual to introduce other stipulations, under the form of provisos or conditions. These may enure either to a temporary suspension of the estate of the lessee, or to its defeasance altogether. But they must be the subject of express stipulation in the agreement for a lease, and must be created by express words. (b)

Conditions, which tend to the defeasance of the estate altogether, may be either such as make the estate void, or such as make it voidable only upon re-entry. (c) A condition of re-entry cannot be reserved to strangers; because no one can take advantage of such a condition, but the reversioner and his representatives: it will follow, therefore, that such a condition cannot be reserved to the *cestui que trust*, or a mortgagor, because they are strangers in consideration of law to the legal estate. (d)

If a lessee for life and the reversioner join in a demise, the condition of re-entry may be reserved to the lessee for life alone: but by his re-entry he can only divest the estate of the lessee for his own life. (e) So it seems that if there are two joint lessors, a condition reserved to one will tend only to a defeasance of a moiety of the estate. (f)

In the earlier cases it is said that the words should move from

(a) Sav. 96.

(b) *Machell v. Dunton*, 2 Leon. 93.

(c) See *Sheph. T. by Prest. tit. Condition*.

(d) *Doe d. Barber v. Lawrence*, 4

Traut. 28.

(e) Dy. 127.

(f) *Flow. 123. a.*

the lessor: but any words, if they amount to giving a title of entry to the lessor for some act done or omitted to be done by the lessee, will be a good condition, though they seem to move from the lessee. (g) So, although, a condition be in the form of a covenant, it will nevertheless operate as a condition, if it appears to be the intention of the parties, and not as a covenant. (h) Conditions are, however, taken strictly, because they tend to the defeasance of the estate of the lessee: therefore, where the lessee covenanted to pay rent, and entered into several other covenants; and it was provided that if the rent were in arrear, or if all or any of the covenants "thereinafter" contained on the part of the lessee should be broken, the lessor might re-enter; and there were no covenants on the part of the lessee after the proviso: it was held that the condition was nugatory, because the court could not reject the word "thereinafter." (i)

Conditions against the law of God, or against the law of the land, are obviously void: but in other respects it is in the power of the parties to deprive the estate of any of its legal incidents. A condition, for example, that the lease shall be void on the bankruptcy or insolvency of the lessee has been held good, as well as a proviso to restrain voluntary alienation by the act of the party. (j) In the case of *Doe v. Skeggs* (k) the court were divided as to the legality of inserting a clause which restrained alienation by the executors of the lessee. Lord Mansfield doubted because, as it was a lease to the original lessee and his executors *eo nomine*, the restriction might be considered repugnant to the original grant, inasmuch as alienation was necessary for the purpose of executing the trust of executorship: but the better opinion seems to be that the executor would be so restrained. (l) A similar objection was made in a case in Chancery, (m) where the *habendum* was to the lessee, his executors and assigns: and it was objected that a covenant to restrain alienation would be re-

(g) *Thomas v. Ward*, Cro. Eliz. 202.

Hayward v. Fulcher, Palm. 491.
Cromwell and Andrew's case, 3 Rep.

71. *Browning and Beston's case*,
Flow. 131. Dy. 6a.

(h) *Hayward v. Fulcher*, W. Jon.
166. Palm. 491.

(i) *Doe d. Bish v. Keeling*, 1 M. &

S. 95. *Moody v. Garnon*, Moor. 848.

(j) *Roe d. Hunter v. Galliers*, 2
T. R. 133.

(k) Cited in *Roe v. Galliers*, *supra*.

(l) *Doe d. Mitchinson v. Carter*, 8

T. R. 61.

(m) *Weatherall v. Goering*, 12 Ves.

513.

pugnant. But his honour the Master of the Rolls said, that the meaning of the word "assigns" must be restricted to such assigns as the lessee might legally have, namely, assigns by act of law, or assigns with licence.

In the king's leases, it is said that if the lessee agree to build *de novo* the premises demised within a year, and to leave them so repaired, these words, being executory, in the king's case operate as a limitation of the estate, because the king can have no adequate remedy by action, and all executory considerations in the king's leases for years operate as conditional limitations. (n)

Under an agreement for a lease it is settled that in equity the lessee is entitled to all usual covenants. Such usual covenants mean covenants usual all over England, and do not refer to the custom of any particular county or district; (o) unless the parties evidently shew that they intend to be guided by local usage. (p)

Conditions of re-entry, also, for the non-payment of rent may perhaps be considered usual, inasmuch as it is a very ordinary and reasonable mode of giving an additional security to the lessor for the payment of his rent; for, as the law now stands, there are not the same objections to such a condition, as to others of the like nature; because by the stat. 4 Geo. II. c. 28. both courts of law and equity are enabled to make an equitable arrangement between the landlord and tenant, even after a breach of such a condition. Other conditions of re-entry do not stand in the same situation; and, although much dispute has arisen as to the condition of re-entry to restrain alienation; yet it seems to be settled that it is, as well as all the rest, a special condition which must be the subject of express stipulation. (q)

In *Buckland v. Hall* (r) Lord Eldon observed that there was a material circumstance in that case, the time by which the repairs were to be done. If the master were ordered to settle a lease, there ought to be a clause of re-entry, if the repairs should not be done by the time stipulated; the time being of the essence of the contract.

(n) *Sawyer v. East*, 5 Vin. Abr. 61.
S. C. Lane 74—79, 108—112.

(o) *Burwell v. Harrison*, Prec. in Ch. 25.

(p) 6 Ves. 467. *Boardman v. Mostyn*.

(q) *Henderson v. Hay*, 3 Bro. Ch.

Ca. 632. *Morgan v. Slaughter*, 1 Esp. N. P. Rep. 8. *Folkingham v. Croft*, 3 Anstr. 700. *Jones v. Jones*, 12 Ves. 186. *Brown v. Raban*, 15 Ves. 528.

Church v. Brown, 15 Ves. 258.

(r) 8 Ves. 95.

Sir W. D. Evans, after discussing the cases relative to covenants against alienation without licence, observes that the condition for vacating leases in case of default in the performance of any agreement may require a very different consideration. So far as his own observation had gone in the course of practice, he had seen very few leases in which such a condition had not been inserted. But there are many cases, he continues, in which the insertion might be attended with the most serious prejudices to the tenant; for it will be seen, in analyzing the several parts of a lease, that the degree in which a court will relieve against such a condition, upon the ground of compensation, is very limited; and a party may be deprived of an estate, for which he has given a great consideration, either by way of fine, or of stipulated expenditure in improvements, from some casual act of omission, with respect to a numerous and complicated series of engagements. The general acquiescence in such covenants, in the course of practice, will form a material, but not a decisive, argument; for, considering them as incidental, as where a lease is so prepared in consequence of a general agreement, it would in most cases be more convenient to accept it as it is, under a confidence of performing the engagements, and that any casual omission will not be taken advantage of as a ground of forfeiture, than to incur the delay and expense of litigating the question in a court of equity. Supposing the point to be unaffected by decision, it may, perhaps, be found that the proper medium would be to imply the intention of such a condition in a mere lease at rack-rent, where the due performance of the stipulations on the part of the tenant would be regarded as the full consideration for the interest conveyed, and to adopt the opposite conclusion in cases where there was to be an additional consideration in the shape of premium or expenditure: but Sir W. D. Evans observes, he was by no means prepared to state that such a distinction would be actually applied. In this, as in most other cases, it is extremely desirable that the matter should not be left to inference or judicial construction: but that the insertion or non-insertion of such a condition should be distinctly stipulated for in the preliminary agreement.

Another important topic applicable to this part of the subject is the agreement for the insertion of usual covenants. Where there is a written agreement in general terms, this qualification is

not implied. (r) In *Brodie v. St. Paul*, (s) the subject was incidentally mentioned. In the course of the argument the counsel observed that if the agreement had been to let with all proper and usual terms, according to the custom of the country, the court would execute it by reference to the master to inquire into the custom of the country, or by directing an issue that such agreements were constantly carried into effect in the Court of Chancery; and the *minutæ* are never at all stated. This was stated in support of admitting parol evidence to explain an agreement, which referred to such parts of a certain paper as had been read; and it was proposed to refer the terms to such enquiry accordingly. Buller, J. said there was a wide difference between the principal case and that to which it had been compared, of an inquiry into the custom of the country: there, he said, the agreement is certain; here it is uncertain what was the contract between the parties at the time. It may be, however, observed in conclusion, that the insertion of such an article of agreement, qualified by the custom of the country, is in its nature calculated to introduce uncertainty, and to excite litigation.

In leases it does not appear that there are any covenants which can be considered usual with reference to cases of specific performance incidentally to the nature of the contract, except the covenants on the part of the lessee to pay rent—to quit at the expiration of the term—to repair the glasses of windows in the lease of a house, and the hedges and fences in the lease of lands, and the covenant on the part of the lessor for the peaceable enjoyment of the premises: but whether this last should be general and absolute, or qualified as only against the lessor, and those claiming under him, does not seem to be perfectly settled. It is however the opinion of Sir W. D. Evans that it should be absolute.

Sir W. D. Evans continues his observations on this part of the subject to the following purport: "I conceive that the difficulties of carrying into execution a general agreement for insertion of covenants according to the custom of the country or neighbourhood are of such a nature, that the conclusions to be come to in any particular instance upon the subject must resolve themselves very much into an appeal to the discretion of the master. The terms 'usage,' 'country,' and 'neighbourhood,' being all of very

(r) *Liebenrood v. Vines*, 1 Meriv. 15.

(s) 1 Vea. J. 326.

loose and indefinite application ; and that, upon an enquiry, very few disputed covenants could be proposed in which whatever latitude or restriction were applied to the terms 'country' and 'neighbourhood,' many leases would be found with and many without such disputed covenants ; so that if the term 'usual' were to be understood either as actually synonymous to 'constant,' or approximating to it, most of the instances insisted upon must be excluded ; whereas if it were merely understood as equivalent to 'frequent,' or even to 'most frequent,' the decision would be the other way. In the estate of great landholders a printed form is commonly used by the steward or agent, containing a great number of restrictions very unfavourable to tenants ; but the performance of which is seldom rigorously enforced. If there is an express allusion to these forms in the preliminary agreement, they are necessarily ingrafted into the contract itself ; and when such allusion is not made, the course of such leases is commonly understood and intended by the parties. And it very seldom happens that it can be for the interest of the tenant to enter into a controversy with his landlord how far his acceptance of a lease containing such covenants is or is not a matter of strict obligation. In leases from owners of single estates such sweeping views cannot be taken, and there is generally more of actual agreement in the settlement of particular terms. What those terms may be must depend on a variety of circumstances applicable to the particular views of the parties : but, as a general proposition, it is manifest with reference to contracts upon this subject analogous to those upon every other, that the more favourable the terms of the contract are to the interest of the tenant in other respects, the larger consideration he will be willing to give in the direct form of rent. On the other hand, every incidental stipulation affecting the powers and diminishing the interest of the tenant must, as matter of general speculation, operate in diminution of the rent which he is willing to give."

"As an illustration of the general question, as to usual covenants of a particular neighbourhood," he continues, "it is matter of very frequent experience to engage that the tenant shall consume the hay and straw on the premises ; but it is also matter of notoriety that these articles are very extensively the object of sale. A master in chancery might therefore be very much embarrassed with reference to the majority of leases actually made in a particular

neighbourhood, whether the sale of hay and straw should be generally allowed, unless particularly excluded; or generally excluded, unless particularly allowed: and there are many other instances which would create a similar difficulty. Upon the whole I apprehend that the safest course would be to consider no other stipulations as falling under the designation of usual than such as approach so near to universal as to lead to a full conviction that they must have been in the understanding and contemplation of the contracting parties. And I am aware that this conclusion is much too loose and indefinite to remove from the subject any considerable portion of the difficulties with which it is embarrassed."

With respect to leases made under the statute 32 Hen. VIII., or by ecclesiastical persons under the restrictive statutes of Elizabeth, it is necessary to observe that there can be no covenants introduced, so as to bind their successors, which are evasive of those statutes; therefore, there can be no more a covenant for renewal in such leases than an extension of the term in the first instance. Such covenants, however, are personally binding on those who make them. (u) And, perhaps, in the case of a dean and chapter, or mayor and corporation, they are binding on the corporation as long as they have the same superior. And the same remarks apply to charity leases where a hospital or charity is restrained by its constitution from making a lease for more than a certain number of years. (v)

Although the statute 18 Eliz. c. 11. makes void all bonds and covenants contrary to its provisions, yet, since it is not held to extend to the stat. 14 Eliz. c. 11., covenants to make leases of houses in towns contrary to the provisions of this last statute seem to be good against the parties who enter into them. (x)

With respect to leases under powers it may be observed that they must be *bond fide* contracts between the lessor and lessee for the purpose of farming and improving the land. (y) And under a power to lease, reserving the usual covenants, the omission of any usual covenants, or the insertion of any unusual covenant, will

(u) The Doctors' Commons v. The Hospital, 14 Ves. 324.

Dean and Chapter of St. Paul's, cited (x) Crane v. Taylor, Hob. 269.

3 Atk. 84. (y) Doe d. Atkyns v. Horde, 1

(v) The Attorney General v. The Burr. 60.

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make the lease void. (s) A covenant for renewal, however, does not seem to be considered sufficient to vitiate a lease, because as against the remainderman it is perfectly nugatory, if not within the terms of the power. And though the tenant for life himself is bound by such a covenant, he is bound in renewing to take as much care of the interest of the remainder as if there were no such covenant. (a) So in the same case there was a condition that there should not be contained in the lease any clause whereby any power or authority should be given to any lessee to commit waste, or whereby he should be exempt from the punishment of waste. A covenant by the lessor to repair was objected to as a breach of the condition: but Lord Ellenborough said this covenant gave the lessee no power to commit waste, nor was he exempt from punishment for waste.

Where the usual covenants are not specified in the power, under a power requiring the best rent, mere reservation of rent is not sufficient, unless the most ample remedy is given to the remainderman for the recovery of it. There ought, therefore, to be a covenant for the payment of rent. (b) There should likewise be a clause of re-entry.

It is suggested by Mr. Sugden that, where a counterpart is required to be executed, the lessee should obtain a memorandum of its execution and delivery to the lessor, to be indorsed on the lease, and signed by the lessor; for the counterpart itself is of course delivered to the lessor: and if it should be lost or suppressed, the lessee would be in danger of losing the estate, unless he could prove the execution of it. Besides that it would be more satisfactory to a purchaser, in case the lessee should wish to sell his interest. (c)

In *Jones v. Verney*, (d) where the power given by a private act of parliament was to demise for any term not exceeding sixty-one years for the encouragement of rebuilding, reserving the best ground rents that could be got, with respect to the charges of rebuilding, and that in every such lease there should be the usual and reasonable covenants; it appeared to the court that the lease intended, was a building lease; and, there-

(s) *Doe d. Ellis v. Sandham*, 1 T. R. East. 305.

705. *Lord Cardigan v. The Duke of Montague*, cited 1 Burr. 123.

(a) *Doe d. Bromley v. Bettison*, 12

(b) 1 Burr. 125.

(c) Sugd. Pow. 630. 3d. edit.

(d) Willes, 169.

fore, that a covenant to build should have been inserted, and that a covenant to repair did not satisfy the power.

In *Doe d. Ellis v. Sandham*, (*d*) under a power to demise, so that usual and reasonable covenants should be reserved, a covenant by the lessor that, if the building should be destroyed by tempest or fire, he, his executors, &c. would rebuild, or that in default thereof the tenant should be at liberty to quit, and should be discharged from rent, was found by the jury to be unusual; and, consequently, the lease was held to be void.

Where usual covenants are required, they must be expressly inserted: but, where no usual covenants are required, it is no objection to a lease under the power, that it does not contain the same covenants as were contained in former leases, if the covenants are upon the whole equally beneficial as those in former leases. (*e*) So if the covenants and conditions be, upon the whole, such as leave the parties upon the same footing as under former leases, their differing in trifling circumstances is not material. (*f*) Upon the same principle, where the power directed that a power of re-entry for nonpayment of rent should be reserved; it was determined in the House of Lords, after much difference of opinion in the courts below, that a proviso to the following effect, namely, "that if at any time the rent should be unpaid by the space of fifteen days after any rent day, and no sufficient distress should be found on the premises," pursued the form required by the leasing power. (*g*) All the cases upon this point were at the same time thoroughly considered; and the result seems to be that such trifling deviations from the letter of the power, are not unreasonable, or contrary to the intention of settlors in creating such powers.

In a late case, (*h*) which has been before cited, it was held to be no objection to the lease, under a power, that by the terms of it the landlord could only distrain after a reasonable demand, and that he was bound to detain the distress till he was satisfied; for this being for his own benefit, he was not abridged of any right of distress, or of sale under the stat. 2 W. and M. s. 1. c. 5. So it was held to be no objection that the right of re-entry depended on the

(*d*) 1 T. R. 705.

(*g*) *Smith v. Doe d. Lord Jersey*, 2

(*e*) *Goodtitle v. Funucan*, Dougl.

Brod. and Bing. 473.

565.

(*h*) *Doe d. Lord Shrewsbury v. Wil-*

(*f*) *Goodtitle d. Clarges v. Funucan*,

son, 5 B. & A. 363.

Dougl. 573.

rents being lawfully demanded : so if the claim of re-entry be upon the rent being twenty-eight days in arrear, it is not unreasonable.

If the trustee of a charity estate make a lease, with a covenant for perpetual renewal, the covenant is clearly nugatory ; especially where no consideration is shewn equivalent to the value of the inheritance, which such a lease in effect would alienate. (i) A case (k) indeed occurs, where it is stated that a decree having been made in Lord Coventry's time for granting a lease of charity lands to J. S., who had been at a great expense in recovering them, for ninety-nine years, determinable on lives, and to be perpetually renewable, it was decreed that the lease should be renewed without fine, but that the rent should be computed at the time of each renewal. It is questionable whether the precedent could now be followed : but there the great seal declared, in explicit terms, that the lease should be renewable for ever, in consideration of past services.

So where (l) an application was made to set aside the lease of a charity estate, with a clause in the original lease for nine successive renewals, at the end of every seven years, a fine to be paid at each time ; and, if the lease could not be set aside, to be relieved against the covenant for renewal : the court thought that there was not sufficient ground for setting aside the lease altogether, for there was no particular mode prescribed for leasing, and the trustees were only obliged to lease beneficially for the charity. There had been a decree in the matter of the charity, which directed a particular mode of leasing ; the first lease had been made pursuant to this decree in every respect, except in the insertion of a covenant for perpetual renewal ; which the trustees afterwards reduced to nine renewals, of which five still remained. The lessees having made considerable improvements, the court directed an allowance to be made to them : and said, that if the five remaining renewals were no more than a reasonable satisfaction for the improvements, the lessee must have the benefit of them. In this case no favour was shewn to the lessees on the score of want of notice, for the lease recited the previous decree in the

(i) *The Attorney-General v. Brook*, 2 Vern. 746.

18 Ves. 319.

(l) *The Attorney-General v. Baliol*

(k) *The Attorney-General v. Smith*, College, 9 Mod. 410.

matter of the charity ; and the decree recited the will under which the trustees claimed, and by which the trusts were created.

Spiritual persons, and those restrained by the statutes of Elizabeth, have no power to make leases with covenants for renewal : so also it is clear that where a hospital or charity is restrained from its constitution from leasing for a certain fixed period, they cannot evade the restriction by any such covenant. (m) But there is no analogy between the trustees of a charity, and a trustee under a private conveyance ; therefore, where a trustee under a creditor's deed covenanted with his *cestui que trusts* to let and manage to the best advantage, and then demised with a covenant to renew, it was held not to be inconsistent with his trust ; for there was no evidence that the covenant to renew was prejudicial ; and it might operate a contrary way, since it might be an inducement to give a higher rent. (n) Where, (o) however, the lessee of a church lease (being left administratrix for the benefit of her children) made an underlease, and also covenanted that as long as she held the head-lease she would renew the underlease, as often as she obtained a renewal of the head-lease, under a penalty of 70*l.* ; the court held that, as she was administratrix for the benefit of her children, she could not bind their interests by a lease so improvident.

It now remains in the last place to consider how the lease, if made in writing, should be executed.

If the lease be by indenture, the lessee should regularly execute a counterpart : but it is not unusual, for the purpose of saving expense, to make a single deed operate as the deed of both parties ; in which case it is lodged in the hands of some indifferent person, who is trustee for both.

If the lessor executes the lease, it becomes his deed, though the lessee should execute no counterpart : (p) but if the lessee alone signs and seals the lease, the deed will have no effect ; neither will the covenants nor any bond to perform them be of any force, because the bond and covenants depend on the lease. (q)

(m) *The Attorney-General v. The Master and Brethren of Hemsworth Hospital*, 14 Ves. 324

(n) *Kirkham v. Chadwick*, 13 Ves. 547.

(o) *Magrane v. Archbold*, 1 Dow. P. C. 107.

(p) *Foster v. Mapps*, Ow. 100.

(q) *Soprani v. Skurro*, Yelv. 19. Stroud v. Willis, Ow. 111.

If a lease be made to two jointly, and one only signs and seals it, but both enter and occupy; the other who did not sign or seal it shall be charged, because his entry and occupation is an evidence of his agreement to it: he is not, however, chargeable with any collateral obligation, contained in the indenture, because he cannot be so charged without signing and sealing it as his deed. (r)

It may be here observed, that it is common to say that leases and other deeds are executed by signing and sealing: but it should be understood that signing is only necessary in those cases in which the statute of frauds requires it. This indeed extends to almost all cases in which leases are in writing; but if we suppose that a lease, although not required to be in writing, be by deed for the sake of the covenants usually introduced, such leases are good, if merely under seal, because nothing more is requisite to their operation as deeds.

The sealing should be after the writing, and before the delivery. Where there are several grantors, and one only seals the deed, this is a good deed as to him, though void as to the rest. In the case of executors, however, their office makes a distinction; and therefore, even where the deed purports to be the grant of several executors, yet if one only seals the deed, it has been held to be the grant of all, since each has the whole interest. (s) A deed with one seal executed by one of two partners, in the presence of the other and with his consent, and as their act, has been held the deed of both: but one partner cannot in the absence of the other, and without his authority, bind the other. (u)

Where a lease is made by a power of attorney, the letter or deed of attorney (for the power must be delegated by deed) only gives the person to whom it is directed the power of signing the name of the principal in his absence: the lease is therefore made in the name and title of the person delegating the power; and then the attorney seals it with the seal of the lessor, and delivers it as the act and deed of the lessor. (x)

(r) Bro. tit. Dette, 80.

(s) Simpson v. Gutteridge, 1 Madd. Ch. Ca. 616.

(t) Ball v. Dunsterville, 4 T. R. 313.

(u) Harrison v. Jackson, 7 T. R. 207.

(x) Comb's case, 9 Rep. 76, b. Fron-

tin v. Small, 2 Lord Raym. 1418.

Pettison v. Reel, 1 Brownl. 130.

Hill v. Seal, 1 Brownl. 128.

White v. Cuyler, 6 T. R. 177.

Moor. pl. 191. Dy.

132. a.

The lease, if by deed, is not complete till delivery; and it may be delivered either to the lessee himself, or to some person in his behalf. No particular form of words is necessary: but a lease cannot be delivered as an escrow to the party himself, let the form of words be what they may, according to the maxim *in traditionibus chartarum non quod dictum sed quod factum est respicitur*. But in the present day it would most probably be a question for the jury under the circumstances. If the delivery be by attorney, and the attorney is called upon to do nothing more than deliver the deed after it is made; it is not necessary that the authority should be by deed. If the deed be delivered as an escrow, the second delivery is a confirmation of the first; and for the purpose of title has relation to the first delivery, although no estate to alien or lease passes till the second delivery.

Strictly speaking, where the lessor is out of possession, an entry ought to be made, and the lease should be delivered upon the land after such entry. In cases where such entry is still necessary, especial care should be taken that the lease, if by deed, be not delivered before entry; for a deed cannot have two deliveries: and on the first delivery the instrument becomes a deed, though void as a lease for want of possession; and then the second delivery cannot make good what upon the first was absolutely void. (x) In the case of *Davies v. Fawkener*, (y) it is said that if a man, being out of possession, make a deed of lease of land to try his title, and annex a letter of attorney to enter, and deliver the lease on the land, and annexes the letter of attorney to the lease, and makes a label of both, and puts his seal on the label, and then puts another seal on the letter of attorney only, and then delivers the letter of attorney only as his deed, and not the lease: this is no delivery in law of the lease, although annexed to the letter of attorney, and so delivered in fact. It has been doubted how far the lessor could so distinguish: but the difficulty is easily obviated by delivering the lease separately as an escrow to the attorney. (z)

If a disseisor has leased the land in several parcels for years, an entry by the disseesee or his attorney into one is good

(x) *Stephens v. Eliot*, Cro. Eliz.

(y) *Ubi supra*.

483. *Davies v. Fawkener*, 2 Roll. Abr.

(z) Bac. Abr. Lease, I. 4.

25. But see *Prest. Sheph. T.* 60.

for the whole, because they are all derived out of one freehold. (a)

The niceties which were formerly required to be observed in this respect are now no longer of much importance: for, soon after actions of ejectment became the usual mode of trying titles, Rolle, C. J. is said to have introduced the modern practice of compelling the defendant, who wishes to come into the place of the casual ejector, before admission to enter into a rule of court to confess the lease entry and ouster at the trial, and to stand on the question of title only. There are some cases however in which it is still necessary to make an actual entry: for instance, when a corporation aggregate is the lessor of the plaintiff, they must give a letter of attorney to some person to enter into and deliver the lease upon the land; for a corporation aggregate cannot appear except by attorney, and they cannot substitute an attorney to enter into the common rule, nor can they themselves enter on the land to demise in person. (b) So also, where the proceedings are in an inferior court, they must proceed by actually sealing a lease on the land, because such courts cannot enforce a rule to confess lease entry and ouster at the trial; neither have they any way of binding persons who do not come in by the ordinary process of the court. (c)

It appears to be settled that the common rule in ejectment does not extend to cases where actual entry is required to avoid a fine with proclamations; but this actual entry relates only to the avoidance of the fine: and after it has been made, there seems to be no necessity to seal a lease upon the premises. Care however should be taken that the demise in the declaration be subsequent to the entry to avoid the fine. (d) An actual entry is not necessary to avoid a fine at common law without proclamations; (e) nor is it necessary to avoid a fine with proclamations, unless all the proclamations have been made before the commencement of the action. (f)

(a) *Cotton's case*, Cro. Eliz. 188. *Holland v. Hopkins*, 4 Leon. 8. *Williams v. Ash*, Cro. Eliz. 181.

(b) *Gilb. Eject.* 35. *Anon. Ventr.* 257. 2 Lev. 182. But see *Runn. Eject.* 149. where the practice is stated to be different.

(c) *Gilb. Eject.* 35.

(d) *Berrington v. Parkhurst*, 13 East. 489. n. *Doe d. Duckett v. Watts*, 9 East. 17.

(e) *Jenkins d. Harris v. Pritchard*, 2 Wils. 45. See 2 Phill. Ev. 173.

(f) *Doe d. Duckett v. Watts*, 9 East. 17.

In the case of leases for years the engagements consequent upon the contract are binding upon the parties immediately upon the execution of the deed and delivery of it by the lessor to the lessee, if at the same time the lessor waives the possession, and there is no impediment to the lessee's enjoying the premises demised, because in that case the lessor has done all in his power towards the fulfilment of the contract, and the lessee by acceptance of the deed has acquiesced in the grant. The lessee therefore is bound to pay the rent, though he should never enter or occupy. (g) And in this respect his estate is to be distinguished from the estate of a tenant at will strictly so called, who cannot be charged with rent except for actual occupation. (h)

With respect to the consummation or perfection of the deed, there is no distinction between estates for years and those for life, any more than between deeds operating as conveyances at common law, and those under the statute of uses. The distinction lies in the effect of the deed after it is consummated and perfected. When a freehold interest is created at common law, no interest passes till livery of seisin is made, which may be done either in person or by attorney.

Livery may be either in deed or in law. Livery in deed is performed by the lessor's coming upon the land and delivering to the lessee a clod, branch, or turf there growing, in name of seisin of all the lands and tenements contained in the deed, or some words to that effect; or it may be made by the lessor's delivering the deed in pursuance of which the feoffment is made in the name of livery of seisin of all the lands in the deed; (i) or by words only without any act of delivery, as if the lessor, being upon the land, say to the lessee: "Enter you into the land, and take seisin of it in the name of all the land contained in the deed." (k) But in all those cases in which the delivery of the deed is made to serve for livery of seisin, some act or word expressive of the intention to deliver seisin should accompany it; for otherwise the delivery will merely be a delivery to perfect the deed. (l) If the livery be of a house, the lessor must take the ring or latch of the door, the house being empty, and deliver it in the form before mentioned;

(g) *Goddale's case*, Dy. 14. a. Plow. pl. 10.
423.

(h) *Cas. temp. Holt*. 199.

(i) 9 Rep. 128. a. 2 Roll. Abr. 7.

(k) 6 Rep. 26. b. 9 Rep. 137. b. See

Cro. Jac. 80. pl. 2.

(l) *Co. Litt.* 48. a. 6 Rep. 26.

and then the lessee must enter alone, shut the door, and open it to let in the others. (m) No livery can be made of running water: but of a standing pool there may, which is by a dish of part. (n)

The power to give or receive livery by attorney must be by deed; and if the deed of feoffment be a deed poll, the letter of attorney may be contained in it: but not so if the lease be by indenture, unless the attorney be a party to it. There is no objection however to writing the power on the same parchment with the indenture, which is the usual way, because in effect they form two deeds. The power must in all cases be executed in the lifetime of the lessor and lessee. (o) An infant may make livery of seisin in person: (p) but he cannot make an attorney to do so for him, because he cannot make a valid deed. (q)

Livery within view is where the lessor is not actually on the land or in the house; but being in sight of it, says to the lessee, "I give you yonder house or land, enter and take possession;" or, by delivering a charter of feoffment within view, says, "I will that you have the lands comprised in this deed according to the purport of it." (r) No freehold, however, can be vested by this species of livery till the feoffment is perfected by the actual entry of the feoffee in the life of the feoffor. (s) Neither can any livery in view be made or received by attorney. (t)

If the feoffment be of lands in different counties, the livery in deed must be made in each: but if it be livery in view, or the parcels be in the same county, though in different lots, livery may be given in one parcel in the name of all. (u) So if livery in deed be made in one parcel of a manor in one county, in the name of the whole manor, which extends into different counties, it is sufficient. (v)

Although a freehold cannot be made to commence *in futuro*, yet if a lease for life be made to begin at Michaelmas, if livery is made *secundum formam chartæ* after Michaelmas, it is sufficient,

(m) 2 Blackst. Com. 315.

(n) 3 Leon. 238.

(o) Co. Litt. 52. 2 Roll. Abr. 8. Co. Litt. 271. b. n. by Butler.

(p) Co. Litt. 52.

(q) Sheph. T. 58. by Preston.

(r) 2 Bac. Abr. 465. 2 Roll. Abr. 7.

pl. 2. Follxf. 47.

(s) Co. Litt. 52. b.

(t) Co. Litt. 46. a.

(u) Litt. s. 418. Perk. s. 227. 2 Roll. Abr. 11. pl. 2.

(v) Greenwood v. Tyher, Cro. Jac.

563.

because the estate passes by the livery, and not by the deed. (x) So if the deed contains a letter of attorney to deliver seisin *secundum formam chartæ*, livery need not be made on the day of the date of the deed: but is good if executed afterwards, and the delay does not avoid the authority. (y)

As the design of livery is to denote a change of possession, the possession delivered should be vacant. It is therefore generally true that the lessor should be in actual possession; and consequently if he has leased his land, or it is extended by a statute, he cannot without the consent of the tenant in possession make a valid feoffment. (x) And if there are several tenants, there must be several liveries. (a) The consent however of the tenants may be implied; but, in thus speaking of tenants it is not meant to include tenants at will or at sufferance, for their consent is immaterial. (b) Again, although the feoffor's lands should be out on lease; yet if he can obtain a clear possession, although the lessee dissent, yet the feoffment will be valid. And it is immaterial whether such possession is obtained by the lessee's absence, or by ouster. (c) Yet, in cases of ouster or absence, the possession of any part of the lands by his wife and children, or servants, has been deemed sufficient to avoid a livery. (d) But the wife of the lessee in his absence as she may avoid, so she may assent to a livery; and, in that case it is good, although the servant and children continue on the premises. (e) As a servant is supposed to act for the benefit of his master, although his presence may avoid a livery, yet he cannot assent to it. (f) The cattle of the lessee is no impediment to livery. So if the lessee for years underlets part for a term, his possession of the residue will not prevent the effect of livery in the part underlet: it would be otherwise, if it was merely let at will. (g)

A power of attorney to deliver seisin may be granted to two or more jointly and severally. If granted to several in general terms,

(x) *Greenwood v. Tyber*, Cro. Jac. 563.

(y) *Walter v. The Dean of Norwich*, Moor. 875. *Roe d. Heale v. Rushleigh*, 3 B. and A. 156. *Hennings d. Vernon v. West*, 2 Wils. 176. *Hennings v. Paucharden*, Cro. Jac. 158. *contra*.

(x) Co. Litt. 48. b. 2 Rep. 31. b.

(a) Dy. 18. a. b.

(b) 2 Roll. Abr. 5. Moor. 11. Dy. 32. a.

(c) Dy. 263. a. 2 Roll. Abr. 4 Moor. 91.

(d) Co. Litt. 48. b. Bro. Feoffm. 6.

(e) Godb. 158.

(f) 2 Roll. Abr. 5. *Darrell v. Stake-ly*, 1 And. 130. *contra*.

(g) *Bctisworth's case*, 2 Rep. 31.

the power is joint, and all must concur in executing it: but a joint and several power may be executed by all or any one. It was formerly said (*h*) that it could not be executed by two out of a greater number, because such an execution is neither joint nor several: but it is doubtful whether such strictness would be now admitted.

The mode of making freehold estates by feoffment, though now no longer absolutely necessary, is frequently resorted to: indeed, there are few freehold leases made without it. If the feoffor be out of possession, says Lord Coke, (*i*) neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of feoffee, and make a perfect tenant of the freehold: but only livery of seisin upon the land. So on the other hand, where the feoffor is in possession, yet if he have an imperfect title, or is unwilling that his title should be inspected by the grantee, there is no way of so effectually making an assurance to the lessee of the freehold as by livery of seisin on the land, because it is the only mode by which an estate of freehold can be obtained by disseisin.

There are some cases however in which no livery can be made as in the king's case, who can neither deliver seisin upon the land, neither can he make an attorney to do so for him: therefore, the delivery of letters patent is held to include livery. (*k*) So also the king cannot take livery, and therefore he can only be enfeoffed by deed inrolled. (*l*)

A lease of tithes or other things which lie in grant during the incumbency or the life of the grantor, or *pur autre vie*, conveys a freehold by the delivery of the deed. (*m*)

The conveyances operating by force of the statute of uses, by which life estates may be created, are covenants to stand seised to uses, lease and release, bargain and sale, and appointments in the exercise of powers contained in settlements. Of these the two latter are the only modes which demand any particular attention, since the other modes of conveyance are rarely used as between landlord and tenant. Enough also has been said of the execution of powers of appointment. It is

(*h*) *Norris v. Trist*, 2 Mod. 78.

(*i*) *Co. Litt.* 49. a.

(*k*) *Barwick's case*, 5 Rep. 94. b.

(*l*) *Bro. Off. Dev. Esch.* pl. 41.

(*m*) *Brewer v. Hill*, 2 Anstr. 413.

therefore only necessary to observe, that by the stat. 27 Hen. VIII. c. 16., (*n*) commonly called the statute of inrolments, it is provided that all bargains and sales by which any estate of freehold shall be made shall be by writing indented, sealed and inrolled, either in one of the courts at Westminster, or in the county in which the lands lie in the proper office of inrolment within six months next after the date of such indentures. The second section excepts all cities, boroughs, or towns corporate, in which the mayors, recorders, or other officers, have authority to enrol evidences, deeds, and writings, within their precincts. The six months in the statute are lunar months of 28 days each, and the day of the date is taken exclusively. If the deed has no date, it may be inrolled six months from the delivery. And although nothing passes till after inrolment, it may, upon oath being taken of its execution by the grantor, be inrolled even after his death.

No grant to the king by deed vests any estate in the king without inrolment; and the inrolment must be in the lifetime of the grantor, because the king can only take by the record. (*o*) The best evidence of such a lease is a copy of the inrolment. (*p*)

With respect to stamping written instruments, it may be observed that the stamping of an instrument is not of any importance further than it is necessary to its admissibility as evidence in a court of law; and although it is not a matter of course that the commissioners of stamps will permit a written instrument to be stamped at any time, yet it is a circumstance of rare occurrence that permission is refused to stamp it, for the purpose of giving it in evidence, upon the payment of the penalty specified by the stamp acts.

It may be useful, however, to bear in mind the following general remarks on this head. It is not sufficient that the stamp used is of the proper value; the stamp must also be the peculiar stamp appropriated to the particular species of instrument. (*q*) Therefore

(*n*) Irish stat. 10 Ch. I. sess. 2. c. 1.
s. 18. For the counties palatine of
Chester, Lancaster, and Durham, stat.
5 Eliz. c. 26. s. 1. York, W. R. 5 Ann.
c. 18. E. R. and Hull, 6 Ann. c. 35.
N. R. 8 Geo. II. c. 6. See also the stat.
33 Geo. II. c. 30. as to inrolments in

the city of London.

(*o*) Sir Edw. Dimock's case, Dy.
74. a. in Marg. Lane, 35.

(*p*) *Stillingfleet v. Parker*, 8 Mod.
248. *Kinnersley v. Orpe*, Dougl. 56.
See stat. 10 Ann. c. 18. s. 3.

(*q*) 1 Phill. Ev. 541.

articles of agreement under seal must have a deed stamp; and an agreement stamp, although of greater value, is not sufficient. (v) An instrument containing a present demise of a house, containing also an agreement for goods and fixtures in the house, requires a lease stamp, the one contract being auxiliary to the other; and, unless it is so stamped, it cannot be given in evidence as an agreement for the sale of the goods in an action for the amount. (s)

The stat. 43 Geo. III. c. 127. provides that if the stamp is of the proper denomination, it shall not be ineffectual from being of a greater value than the stamp acts require. (t) And by the stat. 55 Geo. III. c. 184. s. 10. all instruments upon which any stamp shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole than the stamp which ought regularly to have been used, shall be deemed valid and effectual in law, except in those cases in which the stamp shall have been specifically appropriated to another instrument by having its name on the face.

If the interest of several persons parties to a deed relate to one thing which is the subject matter of the instrument, a single stamp is sufficient: but where there are several parties interested in several subject matters, there ought to be a separate stamp for each, because the instrument is separate to each, although one in form. (u)

Where there are several independent lettings between a landlord and his tenants by one instrument, there ought to be several stamps for each: but if one stamp only appear affixed, it is matter of evidence to which name such stamp is intended to apply; therefore, where (x) a stamp appeared affixed to the defendant's name, and it appeared by the receipt of the stamp officer that the money for affixing it was paid only a short time before trial, and after the commencement of the action; and the instrument was cancelled with pencil marks with respect to every name except the defendant's, and it was not proved that the instrument was not so cancelled at the time when the stamp was affixed, the court held the paper admissible.

(v) Robinson v. Dryborough, 6 T. R. 347.

(s) Corder v. Drakeford, 3 Taunt. 382.

(t) See Farr v. Price, 1 East. 55.

(u) 1 Phill. Ev. 542. See Boase v.

Jackson, 3 Brod. and Bingh. 185. and in the Addenda to the present work.

(x) Doe d. Copley v. Day, 13 East. 241. Waddington v. Francis, 5 Esp. N. P. C. 182.

(y) 1 Phill. Ev. 550.

Where (y) an alteration is made in an instrument with the consent of all parties to correct a mistake, no new stamp is necessary: but, if the instrument so altered be in substance a new contract, it is otherwise.

Agreements are liable to a stamp in proportion to the number of words contained, when the subject matter is of the value of 20*l.* or upwards: but an exception is made in favour of agreement to lease at rack-rent any land or tenement under the yearly rent of 5*l.* Under the head of agreements contracts which are executory in form, but in effect amount to actual demises, are not included; and, therefore, they must have lease stamps. (x)

So the registry acts in the counties of Middlesex (a) and York, (b) and in the town and county of Kingston-upon-Hull, (c) do not avoid the deed as between the parties, but only postpone unregistered deeds to subsequent incumbrances which have been registered. (d) It may, however, be remarked that none of these acts extend to leases on rack-rents, or for terms not exceeding twenty-one years, when the actual possession and occupation go along with the lease; or to copyhold estates, which last exception has been thought to include common law leases of copyhold land: but it seems more prudent to register all such leases of copyhold as would require registry if the land were freehold. The act for the county of Middlesex excepts likewise the chambers in Serjeants' Inn, and the inns of court and chancery. (e) By these acts no time is limited for the registry; but it is advisable to register them immediately on execution where it is necessary.

The Irish registry act is the stat. 6 Ann. c. 20. (f) which establishes a register office in Dublin, on which statute it has been held by Lord Redesdale that it does not permit tacking; and the reasoning adopted by him seems to apply to all such acts. (g) Neither is the registry notice to all intents and purposes; for it is

(x) Stat. 55 Geo. III. c. 184.

(a) Stat. 7 Ann. c. 20.

(b) North Riding, Stat. 8 Geo. II. c. 6.; East Riding, Stat. 6 Ann. c. 35.; West Riding, stat. 2 and 3 Ann. c. 4. Stat. 5 Ann. c. 14.

(c) Stat. 6 Ann. c. 35. See Rigg's Instr. for Regist. and Horseman's Conv. Vol. II. p. 821.

(d) Hodson v. Sharpe, 10 East. 350.

(e) As to the Irish Registry Acts, see 1 Gabb. Dig. 544.

(f) Amended by the stat. 25 Geo. III. c. 47. s. 3. See also Irish Stat. 8 Ann. c. 10. s. 1.

(g) Latouche v. Lord Dunsany, 1 Scho. and Lef. 158.

not notice of every thing contained in the deed, neither is it notice of the deed being duly registered. This act contains the same exception as to leases for terms not exceeding twenty-one years, where the actual possession goes along with the lease, as the English statute. By s. 5. of the Irish statute 6 Ann. deeds unregistered of lands contained in a registered deed shall be deemed fraudulent and void not only against such registered deed, but also against every creditor by judgment, recognizance, statute merchant or staple: but no such clause is in any of the English acts.

To affect a registered deed by notice of a prior unregistered deed, actual notice must be clearly proved amounting to fraud. *Lis pendens* is no notice. Clerical mistakes do not vitiate the inrolment. (h)

Registering the assignment of a lease is not registering a lease under the statute 7 Ann. c. 20.; for the act says that the deed under which the party claims shall be registered, with the names of the witnesses; and the original must be produced to the officer. (i)

A deed cannot be discharged or revoked by parol: for every contract or agreement, says Lord Coke, ought to be dissolved by matter of as high a nature as the first deed. This reason is only applied by Lord Coke to agreements by specialty: but it is strictly true with respect to other agreements, although at first sight it does not appear so; for it appears to be generally understood that executory agreements not under seal before breach may be discharged and abandoned by a subsequent unwritten agreement, as well in cases where the original contract is required by the statute of frauds to be in writing, as where writing is unnecessary. The truth is, that agreements are either by specialty or simple contracts: the law in this respect recognizes no third class, as contracts in writing not under seal. It follows, therefore, that to admit evidence of an unwritten agreement, to shew a discharge or abandonment of a previous written agreement, would not be to dissolve the agreement by matter of an inferior nature; neither does the statute of frauds make any provision respecting the dissolution of agreements. (k)

(h) *Wyatt v. Barwell*, 19 Ves. 435. *dron*, 2 Str. 1064.

(i) *Honeycomb d. Halpin v. Wal-* (k) 1 Phill. Ev. 598.

The durability of leases by all sole corporations, independent of the statute 32 Henry VIII., and within the several other statutes which have been enumerated in the former part of this work, depending on the confirmation of certain persons, required by law to confirm their grants; before we conclude this chapter it will be necessary to consider more particularly who those persons are, and the manner in which this confirmation must be made. With respect to the general nature of this species of confirmation it should be understood to be perfectly distinct from confirmation, as that term is used by the writers on the law of real property. Confirmation, as applied to common law deeds of confirmation, is a release of a right by those entitled to such right, in order to place on a firm basis a voidable estate. A confirmation, as applied to ecclesiastical persons, is an act required by law to be done by persons, from whom no interest passes, to assent to the grants of those who, to some purposes, may be considered as having the whole estate, but who in effect have only temporary interests, the intent of the law being that the necessity of obtaining such assent should have the effect of restraining improvident grants by the latter, which they might otherwise be tempted to make.

The persons who are required by law to confirm the grants of ecclesiastical persons are not always the same; but vary according to the nature of the interest of those who make the leases, and also according to the title of the persons required to confirm them.

The confirmation of the patron of ecclesiastical benefices is not necessary in all cases: for the king is the patron of all bishoprics and most ecclesiastical dignities, yet his confirmation is necessary in very few instances. The distinction seems to be that all sole corporations, who have not the absolute fee and inheritance in them, as, for instance, prebendaries, parsons, and vicars, cannot make estates or leases to bind their successors without the confirmation of the patron: but bishops, like corporations aggregate, have the unqualified inheritance in them; they may make grants, therefore, without the confirmation of the king as patron.

All leases, however, by archbishops and bishops to which confirmation is necessary must be confirmed by the dean and chapter. If a bishop have two deans and chapters, both must concur in the confirmation: but if one of the chapters is dissolved, then the confirmation of the other is sufficient, although, after such lease

and confirmation, the other should be erected again. (*l*) If, however, two bishoprics, which were originally distinct, have been united by lawful authority; and the usage has been ever since the union, that the several deans and chapters should make several confirmations of their respective bishoprics, it will be intended, if the charter of union be not extant, that the union was merely of the spiritual functions of the office: but if the union was made generally, then the confirmation of both deans and chapters is necessary; for they are but one with respect to the bishop. (*m*) If a bishop has no chapter, such of his grants as require confirmation must be confirmed by the clergy of his diocese; for the law allows to no sole corporation the uncontrolled disposition of his possessions. (*n*)

If the dean of any cathedral church makes a lease of his possessions, of which he is sole seised in right of his deanery, and confirmation is necessary, it seems to be the better opinion that the bishop, as well as the chapter, should confirm it. (*o*) The case of *Wallround v. Pollard*, (*p*) which is apparently contrary, seems to have depended on special circumstances; for it was admitted that in that case the dean might have anciently passed the possessions belonging to the deanery with the assent of the chapter alone, and afterwards the deanery being dissolved by act of parliament, a new deanery was erected, and the nomination of the dean was given to the king and his successors: and it was by the same act declared that the dean and his successors might demise, grant, or part with, any of their possessions, as the ancient deans might and used to do. The bishop's confirmation, therefore, was not necessary to the grants of the new dean, because it was not requisite before. The general question, therefore, did not arise in this case; because, either by usage or particular charter, the confirmation of the bishop might not have been requisite before the dissolution of the old deanery.

A prebendary of Salisbury made a lease for years of lands attached to his prebend, situated in the diocese of Exeter, which was confirmed by the bishop and chapter of Salisbury.—It was held to be a good lease, though not confirmed by the bishop of

(*l*) *Abp. of Dublin v. Bruerton*, Dy. 282. b. Co. Lit. 301 a. Dy. 56 a. b. Noy. 94.

(*m*) The case of the Bishop of *Walterford and Lismore*, 12 Rep. 71 a.

(*n*) *Dav. 1. 1 Roll. Abr. 477.*

(*o*) *Deg. Pars. Couns. 120. F. N. B. 194. Bac. Abr. Lease G. II. But see Dy. 40 b. 349.*

(*p*) *Dy. 273. 1 Roll. Abr. 476.*

Exeter; because, although he must have received induction from the bishop of Exeter, yet he received institution, and took the oath of canonical obedience to the bishop of Salisbury, who likewise would be entitled to all the benefits accruing to an ordinary from lapse or otherwise. (*q*)

If a deanery be a mere donative, the king's confirmation as patron, and this only, is necessary to the grants of the dean. (*r*) So if a parsonage or vicarage is donative, the confirmation of the patron alone is sufficient to bind the successor: but if the parsonage be presentative, the confirmation of the patron and ordinary are requisite. (*s*)

The next circumstance which affects the power of confirmation arises from the title of the persons required to confirm. If the bishop or patron of the church is also the ordinary; or, in other words, if the benefice is collative; then the dean and chapter ought also to confirm all leases made by the incumbent, because in such cases the advowson is parcel of the bishopric, with respect to which the bishop cannot charge his successor, without the consent of the dean and chapter. (*t*) For the same reason, the confirmation of the dean is requisite to leases by prebendaries and archdeacons, with respect to whom the bishop is likewise patron and ordinary. (*u*) It seems, however, that if the bishop confirms such leases without the confirmation of the dean and chapter, it will bind the next incumbent, if he is collated by the same bishop; and if the bishop is translated, or resigns, or is deprived of his bishopric, it has been held that his confirmation alone will, during his life, bind the succeeding bishop, and any incumbent collated by him. The confirmation, however, of the dean and chapter alone will not in any case bind the succeeding prebendary, archdeacon, parson, or vicar; because he derives no title from them, and therefore he is not concluded by their acts: such a lease is void on the death of the incumbent who made it. (*x*)

If there is a patron paramount, as well as an immediate patron, they must both confirm: for example, where the parson is patron

(*q*) *Gie v. Rider*, 1 Sid. 75. Leigh Co. Lit. 300 b

v. Helier, 1 Roll. Abr. 479.

(*u*) Lit. s. 648. Co. Lit. 329, 249.

(*r*) Dy. 273. 1 Roll. Abr. 481.

Dy. 356. 1 Leon. 235. 1 Roll. Abr.

(*s*) Bro. tit. Conf. 30. Bac. Abr. 479. 2 Bulstr. 200.

Lease G. 2.

(*x*) Dy. 61 b., 106 b., 289 a. 1 Roll.

(*t*) Bro. tit. Lease 64. Confirm. 21. Abr. 491. Plow. 528.

of the vicarage, a lease made by the vicar, and confirmed by the patron and ordinary, is not good without the confirmation of the patron paramount. (y)

If the patronage be in coparceners or tenants in common, they must all join in the confirmation: for, as to the parson, they all make but one patron. (x) It seems, however, to be the better opinion, that if there is a composition to present by turns, and the lease is confirmed by him who has the next turn and by the ordinary, the presentee of the patron who confirmed will be bound by the confirmation. Under the same circumstances, it has been held, that if the ordinary and patron only confirm, and the parson dies, after which the ordinary collates by lapse, the incumbent, so collated, will be bound by the confirmation of the ordinary. The ground of this opinion seems to be, that the ordinary in the case of lapse has an interest, and not an authority only; and then all who come in under that interest shall be bound by the confirmation of the ordinary. (a)

Though one confirm as patron, and have the fee-simple of the advowson in him; yet, if he has granted away the next avoidance before he confirms, his confirmation of the present incumbent's lease will not be binding on the presentee of the grantee of the next avoidance, unless the grantee joins in the confirmation. (b) And yet this lease is not void on the death of the incumbent; but voidable only. But if it be once avoided, it is gone for ever: for though a parson cannot have a writ of right, because he has not an unqualified fee; yet for this purpose he is considered as having the whole fee in him as a sole corporation; and consequently, the charge being once defeated, the lease shall never take effect against any other incumbent. (c)

If husband and wife, patrons of a church in right of the wife, confirm a lease made by the parson, this shall not bind a presentee of the wife, if she survives; nor shall it bind her heirs, or their presentee: but it is good against the husband, if entitled to the estate by curtesy. (d)

(y) Co. Lit. 300 b. Compl. Incumb. 372.

(x) Dy. 72.

(a) Lancaster v. Lucas, Dy. 72. in margin. 1 Leon. 224. Litt. a. 648.

(b) Moor 67, 481. Dy. 72. b. 155.

a. Spendlowes v. Bucket, Hob. 7. The Earl of Bedford's case, 7. Rep. 8. Oldfield v. Plowden, W. Joh. 454. Gro. Car. 582.

(c) Bac. Abr. Lease G. 3.

(d) Dy. 136. a. 1 Roll. Abr. 479.

The patron's confirmation being in the nature of a charge upon the advowson, can continue in force no longer than his estate in the advowson endures; therefore, if a patron is tenant in tail only, or tenant for life, his confirmation binds such incumbents only as come into the church during his life. On the same principle if the patron's estate is on condition, and after confirmation he breaks the condition, the breach of the condition will defeat the confirmation. On the other hand, if tenant in tail discontinues the estate tail after confirmation, the lease will be good during the discontinuance; and, if he cut off the entail, it will be good for the whole term. (e) So if the patron confirming be tenant for life, and the fee afterwards descends upon him, the subsequent incumbent cannot avoid the lease. (f)

If a church be void, and one present by usurpation, and his clerk, after institution and induction, make a lease which is confirmed by the usurping patron and ordinary, it is said that if the rightful patron recovers, and removes the incumbent, the lease shall, notwithstanding, be good. And a distinction was taken between the presentee of an usurping patron, and one who is inducted when the church is full; for in the latter case, if the clerk, so inducted, make a lease which is confirmed by the patron and ordinary, yet it is void, because he that made it was not parson by reason of the plenarity. But the presentee of an usurping patron is a good parson for the time, and has the right of the church in him; and, therefore, the lessee shall not be prejudiced by his removal. (g)

Although a bishop may have a commissary or deputy to exercise spiritual jurisdiction, such commissary or deputy cannot charge the possessions of the church. Wherever, therefore, the confirmation of the bishop or dean is required, it can never be given in his absence, unless the particular statutes of the college or church authorise the deputy to confirm leases in the same manner as if he were present; because, where the intention of the founder is not specially expressed, the law allows no proxy. (h)

So a mere commendatory dean cannot charge the possessions

(e) 1 Roll. Abr. 480. 1 Roll. Rep. 361. Co. Litt. 300. b.

(f) *Fane v. —*, Cro. Jac. 197.

(g) 1 Roll. Abr. 477.

(h) Compl. Incumb. 367. Dav. 47. b. Palm. 461. Latch. 237. Dy.

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of the church: but if a dean is made a bishop, and before his consecration obtains a dispensation *retinere in commendam* his own deanery, or if he be translated, and after his election, and before his consecration, he obtains a similar dispensation to hold the same deanery with his second bishopric, his old title remains, and confirmations and other acts done by him are as good as if he had never been made a bishop. (i) There is, therefore, a great difference between a dispensation *recipere in commendam*, and a dispensation *retinere in commendam*. A deanery, when given *recipere in commendam*, is chiefly intended to increase the income of the person accepting it: and although, to prevent inconvenience, he may join in acts of necessity, such as exercising spiritual jurisdiction, choosing a bishop, or suing and being sued as dean; yet these acts are not in the nature of incumbences, and are some of them to the advantage of the deanery: but the confirmation of leases may be to the prejudice of the successor, and is a voluntary act. A commendatory dean, in the *recipere*, comes in purely by virtue of the dispensation, and has no other title: but the other is legally a complete dean, and the dispensation *retinere* only enables him to continue so. The same distinction holds with respect to commendatory bishops: for a commendatory bishop in the *recipere* cannot confirm leases; but the archbishop of the province has the power of doing so for him in such case. Neither can the guardian of the spiritualities, during a vacancy, confirm leases: for such confirmation being a voluntary act, none are capable of it except such as have the estate and right in themselves which such commendators, substitutes, deputies, and guardians, have not. (k)

All leases and grants which require the confirmation of the dean and chapter must be confirmed by the dean and major part of the chapter; although, indeed, by usage, a chapter may be held without a majority being present. The consent, however, ought to be given in a regular congregation of the chapter; (*capitulariter congregati*) (l) that is, the dean and the major part of the chapter must be present in one place, not necessarily the chapter-house; neither can any proxies be allowed in this case, more than

(i) Vaughan v. Ascue, 2 Roll. Rep. 450.

(k) Noy. 94. Palm. 460. Latch. 237. 250. W. Jon. 148.

(l) Dr. Harscot's case, Comb. 302.

in that of the bishop or dean, when their confirmation alone is necessary, unless the particular constitution of the chapter allows the use of proxies; for the common law never allows of proxies where the interest of a corporate body is concerned. The consent of the dean and chapter having been obtained singly and distinctly in an assembly of the chapter, no other act is necessary to render the confirmation complete except affixing the seal of the corporation to the deed, which generally carries with it a delivery: (m) although, in special cases, corporations aggregate have the power of suspending the delivery after the deed is sealed. (n) Deans and other sole corporations must be mentioned by their Christian names and surnames, to make their confirmation valid: but corporations aggregate may confirm without expressing either the Christian name or surname of the dean or other superior of the corporation. (o)

As a patron may confirm explicitly by deed or writing, so he may confirm by consequence of law; for if the parson makes a lease for years to the patron, and the patron assigns this lease to another, this amounts to a confirmation in law, because a confirmation being only an assent under the hand and seal of the person confirming, such assent sufficiently appears by the assignment over of the lease. But, without such assignment, the ordinary confirmation alone would not make the lease to the patron binding on the next incumbent, because in the acceptance of the lease the patron is merely passive, and executes nothing under his hand and seal which can amount to a confirmation. (p)

Although persons having a bare right cannot assent for a time, nor upon condition, nor for a part of the thing granted, without the assent enuring for all; yet persons confirming leases for years may qualify their assent as they please. They may, therefore, confirm a demise for a less number of years, or a less quantity of land; or they may confirm all or any part on condition. (q) In a case, indeed, (r)

(m) Anon. 1 Ventr. 257. 2 Lev. 182. *Willis v. Jermyn*, Cro. Eliz. 167. *Good v. Ash*, 3 Keb. 307. *The Derby Canal Company v. Wilmot*, 9 East. 360.

(n) *Compl. Incumb.* 368. *Dyer* 145. 1 Roll. Abr. 479. *Dav.* 42. *Bishop of Ferne's case*, 2 Roll. Abr. 42.

(o) *Dy.* 86. b. 106. b.

(p) *Co. Litt.* 301. b. *Newcomen's case*, 5 Rep. 15. a. *Cro. Car.* 38.

(q) *Cro. Eliz.* 79. *Year book*, 21 Hen. VIII. 41. *Co. Litt.* 297. a. 343. b.

(r) *Dy.* 52. b. 80. a. 328. b. *Cro. Eliz.* 447, 472. 5 Rep. 81. *Moor.* 479. 481. *Co. Litt.* 297, 380. *Tomlinson's case*, *Held.* 75.

where the patron and ordinary confirmed a lease, by the parson for twenty-one years, for seven years only; the confirmation was held to be for the whole term: but that was because the words the lessee's "estate therein" were used; and the estate being considered an entire thing which could not be divided, the confirmation of the lessee's estate for seven years was considered repugnant, and the seven years rejected. If the lease, however, be for life, and made by livery, a confirmation for one hour is good for ever: for the freehold passing by the livery is entire; and such confirmation being an assent to an act which passed the whole, must extend to the whole interest which passed by that act. (s) A confirmation, which merely enures as an assent to the grant of another, may be made either before or after passing any interest; and, in this respect, essentially differs from confirmation in its usual meaning, which supposes an interest already passed. (t) So, it seems, that if one assent to the making of a lease, this is a good confirmation of the lease made after assent given. (u)

The confirmation must be in the lifetime of the lessee, and during the incumbency of the lessor: but if a parson make a lease for years, which is not confirmed by the bishop and patron then in being, it may still be rendered good by being confirmed by the succeeding patron and bishop; because it is absolutely good against the parson himself, and confirmation is only necessary to make it binding on the successor. (x) So it has been held that although a bishop, after making a lease for years requiring confirmation, makes a second lease concurrent with the first, which is immediately confirmed, the subsequent confirmation of the first will make it good and effectual, although the second lease was confirmed before it; because the confirmation adds nothing to it, nor conveys any interest, but only makes it perdurable and effectual. (y)

(s) Bac. Abr. Lease, G. 4.

1 Hen. VI. 8. 8 Hen. VI. 6. Dy. 106.

(t) Co. Litt. 301. 3 Leon. 71. 4

1 Roll. Abr. 480.

Leon. 223.

(x) 5 Rep. 15. Cro. Car. 38.

(u) Owen. 33. See Year books

(y) Moor 66.

CHAPTER IV.

1. ON PRIVITY OF CONTRACT, AND PRIVITY OF ESTATE.
2. ON ASSIGNMENTS OF THE LEASE AND THE REVERSION.

I. A LEASE of chattels unaccompanied with the possession is in general fraudulent and void against creditors, although in the same instrument there may be a valid mortgage of the premises in which the chattels are situated. (a) But if a man be a lessee for years of lands or other real property, an actual interest which binds the land, into whosoever hands it comes, passes to the lessee before entry, and the lessee may reduce it into possession at any time, as well after the death of the lessor as before. It is, moreover, such an interest as he may before entry, grant over to another : and if he dies before entry, it will go to his executor or administrator. This interest, or *interesse termini*, as it is called, has also a capability of surviving, if limited in joint-tenancy, in the same way as a term, which is perfected by entry and possession taken by virtue of the lease. (b)

In some respects it may also be observed, that the lessee for years is in a better situation, with respect to his power of assignment, before entry than after : for in *Bruerton v. Rainsford* (c) it is said to have been agreed by the court that if J. S. make a lease for years to commence after the death of tenant for life, or after the end of a lease for years in being, and a stranger after the end of the lease for years, or at the death of tenant for life,

(a) *Edwards v. Harbin*, 2 T. R. 587. *Wheeler v. Thorogood*, Cro. Eliz. 127.
Steel v. Brown, 1 Taunt. 381.
 (b) Co. Litt. 46. b. 31. b. 270. b. (c) Cro. Eliz. 14.

enters by tort, the lessee may grant over his term notwithstanding the entry of the stranger : but otherwise if he had entered and afterwards had been put out. So, in another case, (d) Williams J. said that, even after the disseisin of tenant for life, he that has a future interest of a term, to begin after such estate for life, may well assign his *interesse termini*, because his interest is not turned to a right. So again, in the case of *Wheeler v. Thorogood*, (e) in an action of ejectment, it is said to have been held clearly by the court, that if J. S. make a lease to B., to commence two years after, that after the two years are expired B. before entry may grant his term, although J. S. continues in possession. The doctrine here advanced, although it has been denied (f) in argument, yet seems to be good law, because, as observed in *Saffyn's case*, (g) an *interesse termini* cannot by disseisin or feoffment, be divested or turned to a right, any more than rents, commons, or other incorporeal rights, which do not directly affect the possession. It is, however, the best way for the lessee to enter, (h) as soon as he has the power of so doing ; for if the time for entry arrives, and the lessee neglects to enter, and before entry the lessor levies a fine with proclamations, and five years pass without claim or entry by the lessee, the term will be barred. In a case indeed, in *Noy's reports*, (i) it was said, that the fine would, under such circumstances, only pass the reversion : but, besides that the authority of the book is not good, (k) it should be observed that there is no reversion for the fine to operate upon, as we shall immediately have occasion to shew, till after the entry of the lessee ; for till then no part of the estate, properly so called, passes from the grantor.

In the cases, which have been just cited, reference has always been made to the time when the right of entry accrued. But there is no distinction between a present term, and a future one in this respect ; the interest of a lessee, to commence *in futuro*, is before the time appointed for entry an *interesse termini* just as much as after. In neither case is the possession

(d) *Stydon v. Glass*, 2 Brownl. 225.
Saffyn's case, 5 Rep. 124. a.

(e) *Cro. Eliz.* 127.

(f) See *Cades v. Oliver*, 3 Leon.
 126.

(g) 5 Rep. 124. a.

(h) *Saffyn's case*, 5 Rep. 124. a.
Cootes v. Atkyns, Godb. 159.

(i) *Archbold v. Cook*, *Noy*, 123.

(k) See *Freeman v. Barnes*, 1 Sid.
 459. 1 Vent. 81.

affected before entry, but in both cases the lease is merely executory; and is in both in the same manner assignable over before entry. It should, however, at the same time be mentioned, that an *interesse termini* at the common law is not a vested interest, in the usual sense of that term; and consequently is essentially different from a vested interest in a future term limited under any conveyance, by force of the statute of uses. Such vested interests under the statute of uses may be turned to a right by disseisin of the estate in possession; because, by force of the statute, an interest actually passes out of the grantor, although to be enjoyed *in future*; and, therefore, every thing which affects the estate in possession affects all the estates derived out of the same estate in fee simple.

Although the *interesse termini* is an interest in the lessee of an assignable nature, yet the execution of the lease without entry is merely an inception of the lessee's title, which he may or may not adopt at his election; and although the interest transferred by the deed is available after entry, from the time of its execution yet before entry it is no part of the estate intended to be granted. Before entry, therefore, the lessee can maintain no possessory action, such as trespass or ejectment; neither can any release or confirmation, either to confirm or enlarge the estate of the lessee, have any effect before entry, because in judgment of law no estate is vested in him sufficient for these purposes. (l) It will follow likewise on the same principle, that before the entry the lessor can grant no estate by the name of the reversion, because the whole estate is yet in him. (m)

In a passage in Vin. Abr. (n) it is said that if a man lease for years, and a stranger enters before the lessee, the lessee cannot have covenant upon such ouster, because he never was a lessee in privity, to have the action; but it may be doubted how far this position is correct, especially with regard to express covenants for quiet enjoyment, or for title; because the covenant is an independent personal contract. But, even where there are none but implied covenants, it may be doubted whether this is good law; for the stranger may have entered by right, and then the effect would be to constrain the lessee to commit a trespass.

In actions of ejectment the entry by the plaintiff is usually

(l) Copeland v. Stephens, 1 B. & A. 294. Litt. J. 459.

(m) Isham v. Morris, Cro. Car. 110.

(n) Tit. Cov. G. pl. 6.

admitted by the common rule, which has been mentioned: but if the plaintiff's title is an actual term of years, the confession of lease, entry, and ouster, it has been said, will not extend to the entry necessary to vest the plaintiff's title. (o) This seems to be the meaning of the case cited below, although it is there very shortly and obscurely stated. But it is further said, it will be intended that he entered, till the contrary be shewn.

Where a term of years is created *de novo*, by bargain and sale, the possession is well severed from the reversion before entry, and is vested in the bargainee, so as to be a good foundation for a release or confirmation: and the bargainor may grant the residue of his interest by the name of the reversion before entry; but, although the statute thus absolutely vests the estate in the bargainee, upon execution of the bargain and sale, yet it has been held that he cannot have an action of trespass without actual entry. (p)

In the point of view in which we have just been considering leases, concurrent leases operate at common law as demises of a future interest; (q) for third persons can never be estopped by them from shewing that the lessor is not in possession; but if such concurrent leases are made for a valuable consideration, paid at the time they are made, it is in the election of the lessee to take it as a common law demise, or as a bargain and sale of the reversion; and, until the lessee makes his election, no release can operate upon such a grant, because no interest passes out of the lessor sufficient for that purpose. (r) Since attornment is no longer necessary to the grant of reversions, no particular act is necessary to signify his election.

With respect to reversionary leases, properly so called, and those which are limited to commence *in futuro*, if the lessee enters before the time fixed for the commencement of his lease, it is at the election of the lessor to consider it as a disseisin or not. If the lessor elects to consider it as a disseisin, no continuance of possession, after the actual commencement of the term, will purge the disseisin; for the disseisin having gained a tortious fee, it cannot

(o) Langhorn v. Merry, 1 Sid. 223. case, Poph. 95. 1 Brownl. 30.

(p) Lutwich v. Mitton, Cro. Jac. 604.

(q) Bro. Attornm. 41. Hayward's

(r) See Darrell v. Gunter, W. Jon. 260. and Banks v. Smyth, 2 Keb. 364.

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give way to a lease for years, which is a mere chattel; (s) yet debt will lie in such a case by reason of the privity of contract. (t) And if the lessor brings debt and recovers, he and all those claiming under him are concluded, because the record is the strongest conclusion; that the lessee is in for years, which the lessor can admit. (u) So where a lease has been made to one in possession, and he continues so, it shall be intended that before the commencement of the lease the lessee was in by agreement between the parties. (x) So on the other hand, if the lessee enters before the commencement of his term, and continues in possession afterwards, and then the lessor enters upon him; it seems to follow that the lessee, though ousted, may well assign his term, when out of possession; for he was not in possession by virtue of his term; and the entry of the lessor having purged the disseisin, the term is well assignable. (y)

After entry the privity between the landlord and tenant is called the privity of estate. And since by this privity he becomes entitled to maintain all possessory actions, he is no longer privileged as to assigning his interest, when out of possession, by actual ouster. There is, however, one exception, namely, in the case of a patentee of the crown. There can be no disseisin of the crown; but the patentee may be ousted, and bring ejectment; this, however, is at his pleasure; and therefore, since the crown cannot be disseised, the lessee may assign his term, notwithstanding the want of possession. (z)

After the relation of landlord and tenant is thus perfected, the estate of the lessee is capable of confirmation. Confirmation, in the general sense of the word, is an approbation of, or an assent to, an estate, already created, which is voidable in its nature, by which the confirmor strengthens and gives validity to it, as far as it is in his power. Such words may be used in a confirmation, as may increase or enlarge an estate: but that is, strictly speaking, by force of such words as are so superadded, and is foreign to the confirmation itself. (a)

(s) *Macdonell v. Weldon*, 8 Mod. 906.

54. *Golding's case*, 2 Leon. 71.

(y) 3 Salk. 134.

(t) *Alexander v. Dyer*, Cro. Eliz.

(z) *Leigh's case*, Ow. 15. *Lee v.*

169. *Metcalf v. Stavely*, Clay, 97.

Norris, Cro. Eliz. 331. *Wyngate v.*

(u) *Green v. Moody*, Godb. 384.

Marke, Cro. Eliz. 275.

(x) *Waller v. Campion*, Cro. Eliz.

(a) *Gilb. Ten.* 75.

Confirmation, where it is required to be expressly made, must be by deed : although confirmation may be by implication of law. Thus if baron and feme lease by deed, and after the death of the baron the feme or her second husband accepts rent, this will be a confirmation in law of the lease against the feme. (b) So if tenant in tail makes a lease for years, and after his death the issue in tail accepts the rent, or distrains for the rent, it will be a confirmation of the lease. (c) But it is necessary that, in confirmations by implication of law, there should be a privity of estate : it will follow, therefore, if tenant in tail or tenant for life makes a lease for years, and the tenant for life dies, or tenant in tail dies without issue, that no act in law of the remainder man can affirm the lease, because it is already void; and there can be no confirmation of a void estate. If, however, the confirmation be expressly made by deed, a privity of estate is not required ; therefore, if my tenant for life make a lease for years, I may confirm the estate for years ; although there is no privity between me and the undertenant. It may likewise by proper words be partial. Thus an estate for years, being fractional and divisible, may be confirmed for a certain number of years only. If, however, the confirmor confirm the lessee's term or estate for so many years, the words " term " and " estate," denoting something which is indivisible, the words which follow will be deemed repugnant, and the confirmation will consequently be absolute. So an estate of freehold cannot be confirmed partially, because it is in itself integral and indivisible : but if there are several estates in remainder, one after the other, the particular estate for life may be confirmed without confirming the rest. It seems, however, that a confirmation of the estate in remainder will, by implication, confirm the particular estate supporting it. (d) In all cases of confirmation the confirmor should have a present right, or an estate actually vested and in possession ; and moreover, at the time of the confirmation, he should be perfectly aware of his right, and of the consequences of his confirmation.

Before we proceed to the subject of assignments it should be distinctly understood that the relation between the landlord and

(b) Vin. Abr. Confirmation, A. 2.
pl. 1.

(c) Bro. tit. Accept. 19.

(d) Litt. ss. 518, 519, 520.

tenant, after the perfection of the tenant's estate by entry, is of a twofold nature. The relation consequent on the delivery of the lease is called a privity of contract. This privity is peculiar to the contracting parties: it remains unaltered, notwithstanding any change in their respective interests; and is transmissible to the legal representatives of each. (c) But the privity of estate endures no longer than the possession is with the lessee, and is destroyed as to the original parties to the contract by any change in the disposition of the immediate reversion. This privity, indeed, is not destroyed or transferred by an underlease; because there is no relation between the undertenant and the original landlord: but if the lessee assigns his estate, the privity of estate is transferred with the assignment; and each succeeding assignee is liable by force of this privity as long he continues in the enjoyment of the estate.

The relation of the landlord and tenant may receive a material alteration in three different ways. The lessee may part with his term; or the lessor may part with his reversion; or both the parties may become different by the lessee parting with his term, and the lessor with his reversion. There is, however, no material distinction in the last two cases: we may, therefore, consider in what manner the contract is affected, first, by the assignment of the term, and, second, by the assignment of the reversion; premising that in one respect the effect of both upon the obligations of the contract are exactly the same. For whether the lessee assigns his term, or the lessor his reversion, no relation will exist between the tenant actually in possession and the reversioner, except what is essential to the privity of estate. In that case all parts of the contract which are merely of a personal nature, or are collateral to the land, will cease, except as far as the obligation of the original parties is concerned; and the new parties will be only subject to such covenants and agreements as are said, technically speaking, to run with the land.

The covenants implied in law of course run with the land. With respect to express covenants, the general rules which determine whether a covenant runs with land, or is collateral to it, may be expressed in a few words. If they relate to a thing *in esse* on the land, and tend to the support of the thing demised, as, for ex-

(c) Latch. 261. Dy. 14. a.

ample, a covenant to repair, (f) they bind the assignee without naming him; if they relate only to some act to be performed *de novo* upon the land, the consequence of which is permanently beneficial to the land, such as a covenant to build a new building on the land, (g) such covenants are not considered inherent parts of the contract, so as to bind "assigns," without naming them. All other covenants for the performance of collateral acts bind only the covenanting parties and their representatives, even where the word "assigns" is used, because they do not affect the subject matter or *corpus* of the lease in respect of which the assignee is so denominated "assign." And in this respect, if a man demise a house or land, together with stock and furniture rendering rent, and the lessee covenants to deliver the stock or furniture at the end of the term, it is merely a collateral covenant; for although the rent may be greater in respect of the stock, yet it does not issue out of the stock, but out of the land; and then the covenant is merely an independent personal covenant, affecting the stock or furniture only, which are things of too perishable a nature to admit of any covenant being inseparably attached to the contract by which they are or ought to be transferred. (h)

The incorporeal nature of the thing demised, however, is no objection to a covenant respecting it being considered as running with it. Therefore, where (i) a lessee of tithes covenanted that he would not let any of the farmers in the parish have any of the tithes, the court held that this covenant ran with the tithes, because the intention clearly was to keep the tithes in pernaney, lest by temporary compositions moduses might be let in, and thus the manner of tithing be obliterated.

These rules are chiefly to be found in Spencer's case, the leading case upon the subject: but there is one other observation requisite in order to make our notion of such covenants more precise; for it is essential also, in order that covenants may run with land, that they be made with the owner of the legal estate. If, therefore, a mortgagee and mortgagor have joined in a lease of the mortgaged lands, and the covenants have been made with the mortgagor and his assigns, these covenants are

(f) *Smith v. Arnold*, 3 Salk. 4. *Ham v. King*, Cro. Car. 221.

Hyde v. The Dean and Chapter of Windsor, Cro. Eliz. 457, 552. (g) *Spencer's case*, 5 Rep. 16. a.

Keeling v. Morrice, 12 Mod. 371. (h) 5 Rep. 16. a.

(i) *Bally v. Wells*, 3 Wils. 25.

collateral, because in the eye of the law the mortgagor is a mere stranger to the estate: therefore, the mortgagee and his assigns can have no benefit from this covenant. (*k*) But there is nothing to prevent the mortgagor from having an action of covenant, because it is a covenant in gross. (*l*)

As this point is one which is best elucidated by examples, it may be useful to enumerate them as they occur in the books. The following may be classed under the first head, namely, such as bind the assignee, though not named. A covenant to pay quit-rents; (*m*) not to commit waste, or not to cut and lop trees. (*n*) A covenant to lime and dung the land; (*o*) to repair or leave in repair at the end of the term, (*p*) as well as a covenant to reside on the demised premises. (*q*) So, in the grant of a watercourse, a covenant to cleanse the same runs with the land. (*r*) One ingredient in this case was that the cleansing had been rendered more chargeable by a building erected by the defendant. So in a case (*s*) where there was a covenant that the lessee, his executors, administrators, or assigns, would grind all their corn, grain, or malt, which they should have occasion to use or spend at the plaintiff's mill according to the custom, although it was held that the custom was plainly unreasonable, because under this covenant all the corn used for horses must have been ground at the plaintiff's mill; yet, if it had been to grind all the corn which they should use ground, it might have related to the premises, and would have bound assignees as running with the land. And in another case (*t*) it was held that such a covenant could not be restrained to corn growing on the premises; yet where (*u*) a publican covenanted that he and his assigns would buy all their beer of the lessor, Lord Kenyon thought it a nice question whether it would bind assignees.

(*k*) *Webb v. Russell*, 3 T. R. 393.

Eliz. 509.

(*l*) *Stokes v. Russell*, 3 T. R. 678.

(*q*) *Tatem v. Chaplin*, 2 H. Bl. 153.

(*m*) *Wentw. Off. Ex.* 178. *Hyde v. The Dean and Canons of Windsor*, Cro. *Eliz.* 552.

(*r*) *Holmes v. Buckley*, Prec. Ch. 39.

(*s*) *Lord Uxbridge v. Staveland*, 1 Vez. 56.

(*n*) *Moor.* 44. pl. 136. *Ward v. Waddington*, Clay. 126.

(*t*) *Hamley v. Hendon*, 12 Mod. 327.

(*o*) *Sale v. Kitchingham*, 10 Mod. 156.

(*u*) *Hartley v. Peball*, Peake, N. P. C. 131.

(*p*) *Matures v. Westwood*, Cro.

A covenant to leave a certain number of acres annually for pasture, belongs to the same head. (v) So on the part of the lessor the covenant for quiet enjoyment will bind the lessor and all those claiming under him, as well as a covenant to renew at the end of the term. (x)

A covenant to drain other land in the same county is clearly collateral. (y) So where (z) the lessor had freehold and leasehold property lying together, and he covenanted in a lease of parcel that if his heirs or assigns should, during the term, have any advantageous offer for the disposal of a certain adjoining freehold parcel, he the lessor, his heirs or assigns, should not dispose of the same without previously making an offer of that parcel to the lessee, his executors, administrators or assigns, at 5*l.* *per cent.* less than the other offer: it was held that this was merely collateral. So again in the case (a) of a lease of ground, with a liberty to make a watercourse and erect a mill, the lessee covenanted for himself his executors, administrators, and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate. This covenant was held not to bind the assignee, because it was only collateral; for the court said, this covenant did not affect the thing demised, either in the nature, quality, or value of it, or in the mode of enjoying it. It might, indeed, have affected the lessors as to other lands in the same parish by increasing the poor's rate upon them: but it could not affect them even collaterally, in respect of the demised premises. Bayley, J. said that he agreed that it was not material to consider how soon the act done might affect the land: but, in order to bind the land, the covenant must either affect the land itself during the term, such as the covenants concerning the occupation of land; or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term. Covenants to restrain the exercise of particular trades in houses fall within the first class, because they affect the mode in which the property is to be enjoyed during the term. The case of

(v) *Cookson v. Cook*, Cro. Jac. Finch R. 212.

135.

(y) *Carith v. Reed*, Moor. 402.

(x) *Tanner v. Florence*, 1 Ch. Ca.

(z) *Collison v. Lettison*, 6 Taunt.

260. *Ashton v. Bretland*, 9 Mod. 59.

224.

Richardson v. Sydenham, 2 Vern. 447.

(a) *The Corporation of Congleton*

Finch v. The Earl of Salisbury,

v. Pattison, 10 East. 130.

Bally v. Wells (b) might rank in the second class; for if a lessee or stranger were in the actual occupation of the tithes during the term, the evidence of the lessor's right to them would be continued; and, therefore, the estate of the reversioner would be better at the end of the term. But in the principal case, although the reversion would not be so much, if the poor's rate was increased; that burthen would be increased by a collateral circumstance. And where this is the case, the covenant will not bind the assignee; for suppose that the covenant were not to employ foreigners in any other mill in the parish, the value of the reversion would be affected in the one case in the same manner as the other. Suppose, further, a covenant by the lessee to make a communication by water from the demised premises, through other persons' lands to another place, in order to facilitate the access to a market, the value of the reversion would be materially affected by the performance or non-performance of such a covenant: but it would not bind the assignee, because all the cases shew that the assignee is not bound unless the thing to be done is to be done on the land demised.

A covenant by the lessor to supply the demised premises with water at a certain rate is a covenant running with land; (c) for it clearly respects the premises demised, and the manner of enjoyment.

In the *Mayor of Carlisle v. Blamire*, (d) it was taken for granted that, upon the ground of so much of a river running through certain lands as would be sufficient to turn a mill, covenant lay against the assignee on a covenant not to divert the water.

In a very recent case (e) it was held that a covenant to insure against fire premises within the weekly bills of mortality, within the limits of the stat. 14 Geo. III. c. 78., was a covenant running with land. That statute enables landlords within the prescribed limits, by application to the governors or directors of the insurance office, to have the sum insured laid out on the premises. The court, therefore, without giving any opinion on the effect of such a covenant in general, decided that it could not be distinguished

(b) 3 Wils. 25.

(d) 8 East. 487.

(c) *Jourdain v. Wilson*, 4 B. and A. 266.(e) *Vernon v. Smith*, 5 B. and A. 1.

from the case of a covenant to lay out a specific sum on the premises. Best, J. thought that it would be a covenant running with land without the provisions of the statute: but on this point considerable doubts may be reasonably entertained.

By the Irish statute 11 Ann. c. 2. s. 6. assignees of leases, their executors and administrators, are liable to all the covenants that the lessees, their executors and administrators, were liable to.

II. All estates which come under the denomination of tenancies, except tenancy at will or at sufferance, are assignable. An assignment is the conveyance of the whole interest, either in the whole or in part of the demised premises. It was formerly, indeed, thought that if a rent was reserved, with a condition of re-entry, this would be an underlease, although the whole term was conveyed over: but it is now settled that such a contract would be an assignment, and create a privity between the original landlord and the grantee; for in effect no interest remains in the grantor, although there is a reservation of a rent, and a condition of re-entry, because neither of these circumstances is inconsistent even with a grant in fee simple. (*f*) If, however, there is a reversion of a single day, there is no room for privity; but it is merely a derivative contract or underlease. (*g*)

A man may become an assignee either by act of law, or by the act of the party. Assignees in law are judgment creditors, and vendees from the sheriff under a *fi. fa.* or other writ of execution; tenants by statute merchant or elegit; assignees of bankrupts or insolvents, and their assignees; as also executors and administrators. By the Irish law, (*h*) assignees for valuable consideration of judgments, statutes staple and merchant, whose assignments are registered, may revive as conusees, and may proceed in every respect as the assignors might have done. Assignees, by the act of the party, are assignees who take by virtue of some deed or instru-

(*f*) *Palmer v. Edwards*, Dougl. 187. n.

v. Hatch, Dougl. 183. *Eaton v. Jaques*, Dougl. 460.

(*g*) Litt. S. 483. Co. Litt. 281, b. *Crusoe v. Bugby*, 3 Wils. 237. *Kinnersley v. Orpe*, Dougl. 56. *Molford*

(*h*) Stat. 9 Geo. II. c. 5. amended by the Irish stat. 25 Geo. II. c. 14. s. 4.

ment in writing immediately from the tenant in possession, and devisees and legatees who take by the special designation of the lessee by will.

There are three sorts of writs of execution which chiefly affect leasehold property. First, a *fi. fa.*, which affects all personal property, whether consisting of chattels real or personal. (i) Secondly, an *elegit* which affects lands as well as goods. It extends all the goods but a moiety only of the land: terms for years however may be considered either as lands or goods; and consequently, if considered as personalty, they may be sold outright under an *elegit*. Thirdly, an *extendi facias*, or an extent for the king's debt or in aid of the king's debtor, affects the whole of the lands; or in some cases body lands and goods. These are judicial writs issuing out of the court, where the record is upon which they are grounded, and are for the purpose of securing the damages or debt damages and costs in any civil action.

1. At common law the writ of *fi. fa.* had relation to the teste, and bound the lands and effects of the debtor from that time even against a purchaser for valuable consideration. (k) But now, as far as purchasers are concerned, the statute of frauds (l) has enacted that no *fi. fa.* or other writ of execution shall bind the property, but from the time the writ shall be delivered to the sheriff, and for the better ascertaining the time, the officer receiving it shall indorse on the writ the day of the month and the year on which he received it. This statute however being made only in favour of purchasers, it does not alter the law as between the parties; therefore, if the execution be tested in the defendant's lifetime, it may be taken out and executed after his death. (m) So, if the plaintiff die after a *fi. fa.* sued out, it may be executed notwithstanding in behalf of his personal representatives, since the sheriff derives his authority from the writ. (n) Where an outgoing tenant agrees to assign the re-

(i) See Comb. 291. Qu. Whether an estate *pur auter vie*, since stat. 29 Car. II., can be sold under a *fi. fa.*?

(k) Gilb. Exec. 13. 7 T. R. 24 arg.

(l) Stat. 29 Car. II. c. 3. s. 16.

(m) Parsons v. Gill, Com. Rep. 117. Odes v. Woodward, 2 Lord Raym. 850. See 3 P. Wms. 399.

(n) Cro. Car. 459. Harrison v. Bowden, 1 S.d. 23.

mainder of his term, the sheriff before actual assignment may, under an execution against the outgoing tenant, sell the term, and put upon it the value the incoming tenant agreed to give. (o) But neither before the statute nor since, is the property of the goods altered till execution executed.

If two writs of execution from different plaintiffs are delivered to the sheriff on one day, he ought to execute first that which is delivered first: (p) but if the sheriff execute the writ last delivered before the other, whether it was delivered the same or a subsequent day, the property is bound by the sale, and the only remedy which the party can have is against the sheriff. (q) By this writ among other things the sheriff may seize and sell corn growing, and such fixtures as may be removed by the tenant independently of the lease. (r)

In assigning a term of years, which has been taken in execution, it is not necessary for the sheriff to state in the assignment the particular interest which the defendant has, for he may not be able to come at the precise knowledge of it: but it is sufficient to state that the defendant is possessed of a term of years yet to come and unexpired, and to assign all his interest therein generally; and it is more prudent to state the interest in this way than to state it particularly; for if he fail in any particular, the vendee will not have a good title. A false recital however is not material, if the sheriff afterward sells all the interest of the defendant in the premises. (s)

It is said that if a sheriff on a *fi. fa.* sell a lease, he cannot legally put the vendee in possession: but that the vendee must bring his action of ejectment. This, however, must be understood of forcible expulsion: (t) for it has been determined (u) that under a *fi. fa.* the sheriff may justify expelling the defendant peaceably; or, in other words, if the defendant will consent to go out, the sheriff may put the defendant in possession.

If the defendant has, subsequently to the delivery of the writ to the sheriff, made an assignment of his leasehold estate, the judgment creditor need not bring a suit in equity to come at the

(o) *Sparrow v. The Earl of Bristol*,
1 Marsh. 10.

(p) *Hutchinson v. Johnson*, 1 T. R.
729.

(q) *Hutchinson v. Johnson*, *supra*.

(r) *Gilb. Exec.* 19.

(s) *Palmer's case*, 4 Rep. 74. a. Arg.

3 T. R. 294.

(t) *The King v. Dean*, 2 Show. 85.

(u) *Taylor v. Cole*, 3 T. R. 292.

estate; but he may proceed to sell: and the vendee will be entitled to the possession, notwithstanding such assignment. (x) Where (y) however the defendant has only an equity of redemption, or merely an equitable interest of any other kind, the plaintiff's remedy is in equity; and if the equitable interest in question be an equity of redemption, he must file a bill to redeem: but he will not be entitled to do so without taking out execution, for before that he has no lien.

We have seen that a purchaser *bond fide* and for valuable consideration will be protected, if he has purchased before the delivery of the writ. So also, although the lessee sell fraudulently, yet if his immediate assignee sells to a *bond fide* purchaser for valuable consideration before the delivery of the writ, such *bond fide* purchaser will be protected. (z)

The property and goods of A. being in possession of the sheriff under a *fi. fa.*, he executed a deed of assignment to B. for valuable consideration; on which the execution was withdrawn. B. superintended the management of the property, but permitted A. to remain in possession. The same property was seized under a subsequent execution; and it was held that it was protected by the assignment to B., though A. continued to have the visible possession. (a)

So again if A. indebted to B. and C., after being sued to judgment and execution by B., go voluntarily to C., and give him a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied the same day on which B. would have been entitled to execution, such preference given to C. is not fraudulent within the meaning of the stat. 13 Eliz. c. 5. (b) So an assignment for the benefit of all the creditors pending a suit by a particular creditor is not fraudulent within the same statute, though made with the intent to delay the particular creditor's execution. (c)

If the writ be against one of two partners, the sheriff may seize their joint property, although in undivided moieties: he

(x) *Scott v. Scholey*, 8 East. 467.
Burdon v. Kennedy, 3 Atk. 739. *Lyster v. Dollard*, 3 Bro. Ch. Ca. 478.

(y) *Ubi supra*.

(z) *Wilson v. Wormal*, Godb. 161.

(a) *Joseph v. Ingram*, 1 B. Moor

189. But the court granted a new trial.

(b) *Holbird v. Anderson*, 5 T. R. 235.

(c) *Pickstock v. Lyster*, 3 M. and S.

371.

may therefore sell an undivided moiety, and the vendee will be tenant in common with the other partner. (d)

It may be here observed that, in the case of a ready furnished house, the sheriff has no right to seize the furniture during the lease under a *fi. fa.* against the lessor: (e) yet there is nothing to prevent his seizing furniture or stock so leased by virtue of a writ against the lessee; for the lessor has by the lease parted with the right of possession, so that the landlord cannot maintain either trespass (f) or trover (g) against the sheriff for taking them, although he should have notice that they were only leased, and actually belonged to the landlord.

If the sheriff under a *fi. fa.* seizes and sells a term before the writ is returnable, but does not execute the assignment till a subsequent period, it will be nevertheless a valid sale; (h) for the sheriff by the writ of *fi. fa.* has an authority to sell: and having once seized in execution of the writ, he is bound, even after his general authority has ceased, to proceed to sell and to do every thing necessary to complete the sale. So also it appears that the power communicated to the sheriff by the *fi. fa.* does not even cease upon the expiration of his office: but he is bound to proceed after having once seized the goods. (i)

If the sheriff sell a term under a *fi. fa.*, and the *fi. fa.* is afterwards set aside for irregularity, the produce of the sale may be directed to be returned to the termor: but the term cannot be recovered from the vendee, because the sheriff had an authority; and, therefore, the property passed irrevocably. (i)

Where an assignment was made under an execution on a *fi. fa.*, in the name and under the seal of office of the sheriff, by A. B. acting as under-sheriff; in ejectment it was held not necessary to prove the appointment of A. B., or that he had power to seize, for the sheriff. (k)

(d) *Heydon v. Heydon*, 1 Salk. 392.
Jacky v. Butler, 2 Lord Raym. 871.
Pope v. Harnam, Comb. 217. *Marrion v. Shaw*, Com. Rep. 277. *Fox v. Hanbury*, Cowp. 449. *Eddie v. Davidson*, Dougl. 650. *Smith v. Stokes*, 1 East. 367.

(e) *Garten v. Ashlin*, 1 Madd. 150.

(f) *Ward v. Macaulay*, 4 T. R. 489.

(g) *Gordon v. Harper*, 7 T. R. 9.

(h) *Doe d. Stevens v. Doveton*, 1 B. and A. 230.

(i) 1 Roll. Abr. 893. *Clerke v. Withers*, 6 Mod. 295.

(j) Dy. 363. pl. 24. 5 Rep. 90. b. 8 Rep. 96. 143. *Doe d. Emmett v. Thorn*, 1 M. and S. 425.

(k) *Doe d. James v. Brown*, 5 B. and A. 243.

2. An elegit is founded on the stat. Westm. II., (k) by which it is enacted, that when a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him who sues for such debt or damages to have a writ to the sheriff for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor, (except his oxen and beasts of the plough), and a moiety of his land until the debt be levied by a reasonable price and extent. Upon this writ the sheriff must impanel a jury; and the goods and chattels being appraised, must be delivered to the plaintiff at the price set upon them by the jury. (l) If the jury find a wrong term, the sheriff cannot deliver any other, because he cannot sell without an inquisition; and if the inquisition find one thing, he cannot sell another: but the inquest may find generally that the debtor was possessed of certain land for years to come and unexpired, without shewing in certainty the beginning or end of the term. (m)

If the goods and chattels are sufficient to satisfy the demand, the sheriff ought not to extend the land; (n) but otherwise he may extend a moiety not only of land, properly so called, but also of the reversion. (o) So also by force of the stat. 29 Ch. II. c. 3, lands held in trust may be extended in the hands of trustees for the debts of the *cestui que trust*. It is, however, held that the trust of a term is not within the statute; the statute only applying to a trust of lands in fee. An equity of redemption, it seems, may be extended. (p) Advowsons in gross are not extendible; (q) neither are copyhold (r) or glebe lands: (s) but this must be understood of copyhold lands, properly so called, or glebe in the hands of the parson or vicar. But if a common law lease of copyhold lands be made, this is a suspension of the copyhold tenure; and they are extendible in the hands of the lessee, who has a common law interest. So it is conceived that if the rector or vicar lease his glebe, the interest of the lessee is extendible, and that the exemption is merely personal to the

(k) Stat. 13 Edw. I. c. 18.

(l) Gilb. Ex. 33.

(m) Palmer v. Humphreys, Cro. Eliz. 584. Dy. 100, pl. 4. Gwynn v. Brandling, 1 Brownl. 38.

(n) 2 Inst. 395. 1 Crompt. 346.

(o) Gilb. Ex. 39.

(p) Forest, 162. King v. Ballet, 2 Vern. 248.

(q) Ibid.

(r) 1 Roll. Abr. 888: 3 Bl. Comm. 419.

(s) Gilb. Ex. 40.

vicar or rector. A term of years may be either extended or sold, as part of the personalty. (t) If it be extended, the plaintiff is accountable for the profits he receives out of the term upon such extent; and if he receive the debt out of such term before it expires, the defendant shall be restored to the term itself: (u) but otherwise the plaintiff shall keep the term, and not account for the profits. (x)

After the inquisition is taken, the sheriff must deliver a moiety of the lands by metes and bounds: (y) and if the defendant be joint-tenant or tenant in common, it must be specially alleged in the return of the inquisition; (z) and the objection may be taken at *nisi prius* on the trial of an ejectment brought upon the elegit. (a) The sheriff, however, is not bound to deliver the moiety of each particular farm or tenement, but only certain tenements amounting in value to a moiety of the whole. (b) If he deliver more than a moiety, the execution is void. (c) It was formerly usual for the sheriff to deliver actual possession, but he now only delivers legal possession: and, in order to obtain actual possession, the plaintiff must proceed by ejectment; (d) in which an examined copy of the judgment roll, containing the award of the elegit, and return of the inquisition, is evidence of the lessor's title, without proving a copy of the elegit and of the inquisition. (e)

If a term is extended on an elegit, and afterwards judgment is reversed, the sale and delivery under the extent will not debar the lessee of his term; and in this respect an elegit differs from a *fi. fa.* For a *fi. fa.* gives an authority to the sheriff to sell, and to bring the money into court; therefore, when he sells the term to a stranger, although the execution be reversed, yet the defendant shall not be restored to the term, but to the monies, because the stranger comes in by act of law. (f) But the sale and

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| (t) Fleetwood's case, 8 Rep. 171. | (c) Putten v. Purbeck, 2 Salk. 563. |
| (u) Gilb. Exec. 35. | (d) Lowthal v. Tomkins, 2 Eq. Abr. 381. Taylor v. Cole, 3 T. R. 295. See Rogers v. Pitcher, 6 Taunt. 206. |
| (x) Ibid. 33. | (e) Ramsbottom v. Buckhurst, 2 M. & S. 567. |
| (y) Dalt. Sher. 135. | (f) Dy. 363. a. pl. 24. Turner v. Felgate, Tho. Raym. 73. |
| (z) 1 Brownl. 38. Hutt. 16. | |
| (a) Fenny d. Masters v. Durrant, 1 B. & A. 40. | |
| (b) Denn d. Taylor v. Lord Abingdon, Dougl. 473. | |

delivery of the lease to the party himself on an *elegit* is no sale by force of the writ delivered on the extent; and therefore, the judgment being reversed, the party shall be restored to the term itself. (*g*)

By stat. 21 Jac. I. c. 24., a new execution may be awarded against the lands of him that dies in execution. And by the Irish stat. 35 Geo. III. c. 30. a person who has charged and detained his debtor by *ca. sa.* shall have the same execution against his lands and goods, as if he had not charged or detained him.

3. The execution for the king's debt, whether of record, or not of record, is a writ of extent; which is either immediate, or in aid of the king's debtor. As to debts of record due to the crown, they bind the lands of the king's debtor from the time of his incurring the debt; and an execution may be taken out for such debt, though an *elegit* may have been issued at the suit of a subject. (*h*) They will also bind the lands into whatsoever hands they come, but if the lands have been aliened for a limited time, in part or in the whole, before the debt contracted to the crown, the king can only hold subject to such charges. He must, therefore, redeem the goods of a lessor or mortgagor, if they have been aliened before the debt was contracted. (*i*) If the debt is a simple contract debt, it must be recorded before the extent can issue, for which purpose a commission must issue out of the exchequer, and the inquisition when returned is matter of record. (*k*)

If lands are seized in execution taken out for the crown, the crown shall hold the lands against the conusee of a former statute: but if a conusee of a prior statute sue out execution, and has the lands delivered to him, the king cannot affect these lands in his hands. (*l*) Where the king and the subject stand in equal degree, the king's prerogative must prevail. (*m*) He acquires an immediate property by seizure. (*n*)

Judgments in favour of the crown bind the land from the first day

(*g*) *Goodyere v. Ince*, Cro. Jac. 246.

(*l*) *Hall's case*, 3 Leon. 240.

(*m*) 9 Rep. 129. b.

(*h*) 2 Roll. Abr. 156. Gilb. Exch. 91.

(*n*) Cro. Car. 149. *Stringfellow's case*, Dy. 67. West. Ext. 123. But see 2 Roll. Abr. 157.

(*i*) Gilb. Exch. 91.

(*k*) West. Extent. 20.

of the term in which they are recorded (*n*): recognizances from the caption or the time they are entered into. (*o*) The court, however, will not grant a new writ of extent, of the date of a former tested several years before, (eight or nine in the case (*p*) cited below), on the ground that the defendant has been since found to have been further indebted to the crown; and to have had at the time of issuing the first extent property not then known to belong to him; and though his goods and chattels, seized and sold under that writ, produced only so much as would satisfy a very small part of the crown's original debt. The court, in refusing the application, said that the granting it would be attended with very mischievous consequences, as it would have the effect of bringing before a jury all the circumstances relating to the transfer of the property after so long a period, to the probable prejudice of *bond fide* purchasers. On application being then made for a writ of the present date, the court said, that would be granted of course out of court by a baron: for, while the king's debt remained unsatisfied, a new extent might at any time be had without motion, if the defendant should subsequently have acquired new property.

By the common law, all the goods and chattels of the king's debtor may be sold, for the debt due to the king, (*q*) as well those in possession of trustees, as those in his own. (*r*) An equity of redemption may be extended. (*s*) Yet the king is bound in all cases by an actual assignment *bond fide* for good consideration made before the extent, because the property is thereby actually transferred. (*t*) So after the delivery of a *fi. fu.* or other writ of execution to the sheriff, on the part of a subject, although the property is not altered, yet it is so bound that the prerogative of the crown cannot attach. (*u*)

In a late case (*x*) it was held, that where an equitable mort-

(*n*) Gilb. Exch. 90. 2 Tidd. Pr. 1077.

(*o*) Gilb. Exch. 83. St. 33 Hen. VIII. c. 39. 2 Tidd. Pr. 1074.

(*p*) The King v. Harvey, 7 Price Exch. Rep. 238.

(*q*) 2 Roll. Abr. 160. pl. 8. Mag. Ch. c. 18.

(*r*) 12 Rep. 2.

(*s*) Park. 195.

(*t*) R. v. Pixley, Bunb. 202. Awdley v. Halsey, W. Jon. 202. The Attorney-General v. Capell, 2 Show. 480.

(*u*) Lechmere v. Thoroughgood, 3 Mod. 236. Uppom v. Sumner, 2 Bl. 1294. Com. Dig. Dett. G. 8. See 4 T. R. 412.

(*x*) Casberd v. The Attorney-General, 6 Price Exch. Rep. 411.

gage had been made by the deposit of title deeds, by a simple contract debtor to the crown, and the crown afterwards seized the estate, and sold it under the stat. 13 Eliz. c. 4., (which enabled the crown to make such sales,) the equitable mortgagees were entitled to a priority, in being paid out of the proceeds before the crown. But if the crown had been in possession of the legal estate, it does not appear that the crown could have been considered a trustee for the mortgagees. "I felt," said Lord C. B. Richards, in his judgment, "the embarrassment which arose from the doctrine, that the crown, generally speaking, cannot be considered as a trustee: I say generally speaking; for I do not mean to say, that it is so universally: and I do not know, if the crown had had the legal estate here, how I should have got it out of the crown's hands for the benefit of the person who would have been *cestui que trust*: but it is not so here, for the crown had no estate at all. It is observable that in this case the collector of the assessed taxes of a parish, though liable to an immediate extent, was held to be only a simple contract debtor, till his debt should be put on record by an inquisition. If he had been a debtor to the crown of record, or one of the persons described in the stat. 13 Eliz. c. 4. s. 11, as collectors or receivers of money for the use of the king's majesty, there is no doubt that whether there was an equitable or a legal mortgage on the lands, it would not have affected the crown. With respect to the latter point, the Lord C. Baron said, that he did not see one word in the statute, which applied to the case in question. The collector was not appointed by the crown; he was not a servant of the crown; nor did he give any security to the crown: but the security he gave was to other persons. He received no pay from the crown, and he was no further accountable to the crown, than as every person is subject to such process, who has *quocunque modo* money of the crown in his hands. (y)

In the same case the Lord C. B. also observed, that before the case of the King v. Smith (z) there was considerable doubt in Westminster Hall, whether the crown's debtors by simple contract, were not in the same situation as debtors of record: and whether purchasers of estates from them were not affected by the crown's

(y) See also stat. 14 Eliz. c. 7. and post, p. 495.

(z) Sugd. App. to his Treat. on Vendors and Purch. p. 24.

debt. But great industry and research were used in that case to shew that the doubt arose from a mistake and too implicit faith in what had been reported to have been said by an attorney-general in former times.

As to the king's debts, by specialty, not of record, the remedy for the recovery of them is governed by the stat. 33 Hen. VIII. c. 39., (a) by which all obligations and specialties made to the king shall be made payable immediately to the king, his heirs or executors, and have the same effect as statutes staple taken according to the stat. 23 Hen. VIII. c. 6. This statute is not confined in its operations to bond debts only, but extends to all debts and executions at the suit of the king. (b) But it seems to be restrictive of the old prerogative; for by sect. 26. it is provided that the king's suit shall be preferred to the suit of the subject only where it is taken or commenced, or any process awarded before judgment given for the subject: therefore, it has been held that a judgment and execution, before any suit or process commenced by the king, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. (c)

If the king comes to a bond or recognizance of his debtor, by act of law, or act of the party, he may extend the whole land of the obligor or conusor, where the debtor himself would have been only entitled to a moiety. (d) Where, however, a bond is assigned to the king, the inquisition will be only of those lands which the obligor had at the time of the assignment, and not of those which he had at the time of making the bond. (e) Now by stat. 7 Jac. I. c. 15., it is provided that no debts shall be assigned to the king, except such as were due originally to the king's debtor. (f)

If a bond come to the king, in which the heir is not named, the heir shall not be charged: but it seems that he shall be charged,

(a) Irish stat. 21 and 22 Geo. III. c. 20.

(b) Sir Thomas Cecil's case, 7 Rep. 18. b.

(c) The Attorney-General v. Andrew, Hard. 23.

(d) 5 Rep. 56. a. Sav. 133. The King v. Death, Cro. Car. 513. 3 Leon. 240.

(e) 7 Rep. 20.

(f) Fawn's case, Cro. Jac. 524. R. v. Clarke, Bunb. 221.

if the bond was made originally to the king without the word "heirs;" (*h*) for it is said in many books that on the death of the ancestor, debtor to the crown, his lands are not assets till the king's debt is discharged. (*i*)

All accountants to the crown are debtors to the crown from the time they become liable to account: so the sureties of an accountant to the crown are also debtors to the crown on default of such accountant. (*k*) So the executors of an accountant are themselves chargeable in account, which is an exception to the general rule of the law, that actions of account do not lie against executors. (*l*) If, however, the sheriff or escheator upon office found of issues, amerciaments, or mesne profits, due to the king in his bailiwick, by reason of intrusions, enters into his account an *oneratur nisi*, (*scil. oneratur nisi sufficientem habeat exonerationem,*) by the course of the exchequer, the persons amerced cease to be debtors to the crown, and become debtors to the sheriff, the sheriff alone becoming responsible to the crown. (*m*)

By the stat. 13 Eliz. c. 4. s. 1., all lands, tenements, profits, commodities, and hereditaments, which any treasurer or receiver of the courts of exchequer, &c., or other officers therein mentioned, then had or at any time thereafter should have, within the time, whilst he, or they, or any of them, should remain accountable, should for the payment of all arrears to the crown, at any time thereafter to be lawfully adjudged, (all his due and reasonable petitions being allowed,) be liable to the payment thereof, and be put and had in execution, for the payment of such arrears, in as beneficial a manner as if they had, the day they became accountants, stood bound by writing obligatory, having the effect of a statute of the staple to the queen, her heirs and successors, for the payment of the same arrears.

By the stat. 27 Eliz. c. 3. s. 2. it is enacted, that if any treasurer, receiver, collector, farmer, customer, teller, or other person

(*h*) 33 Hen. VIII. c. 39. s. 50. Rep. 92. b. See Madd. Hist. Exch. 192., and Magn. Ch. c. 10.

(*i*) Yearbook. 43 Edw. III. 9. b. 21 Edw. IV. 21. b. Herbert's case, 3 Rep. 12. b. 11 Rep. 93.

(*l*) Doddington's case, Cro. Eliz. 545. F. N. B. 117. Co. Litt. 90. b. n. 2, 3.

(*m*) Keilw. 187. 4 Inst. 116.

(*k*) The Earl of Devon's case, 11

accountant shall be found in arrears, and shall not within six months next after his account finished pay such arrears, the crown may sell his lands, and deliver the surplus to the accountant: but this act does not extend to accountants having a yearly receipt, nor to any whose receipt does not exceed 300*l*.

This act has been explained by the stat. 27 Eliz. c. 4, to extend to cases wherein the accountants die, and to eight years after against their heirs; provided that before the heir, after the death of his ancestor, shall have sold the land, a *scire facias* shall issue against him. The fourth section protects sales by the heir *bond fide*, for good consideration, before the awarding any *scire facias*; the fifth section enumerates the accountants who are the object of the act, viz. tellers, receivers, treasurers, customers, cofferers of the household, farmers of impost, collectors, bailiffs, victuallers, and other officers of receipts and accounts. Where the debt shall grow due in the Duchy of Lancaster; then after the death of the accountant, and before sale of his lands by the heir, the following process is to be awarded:—A privy seal, in the nature of a *scire facias*: and if the heir shall make default on the day of the return of the privy seal, then, on affidavit made of the service of the privy seal, an attachment shall be awarded and published in some market-town where the heir shall be living, on a market-day, in open market, twenty days before the return thereof; and if the heir shall not obey this process, then execution is to issue. By the seventh section of the same statute no sale of the lands of the heir can take place during his minority: but the sale may be at all times within eight years after his full age. Neither can any sale take place if a *quietus est* or discharge has been entered in the accountant's lifetime. (n)

The stat. 25 Geo. III. c. 35. amends the two last statutes; and provides, that the court of exchequer may on the application of the attorney-general, in a summary way by motion, order, that the estate of any debtor to the king, and of the heirs and assigns of such debtor, in land, which shall be extended under a writ of extent or *diem clausit extremum*, or a sufficient part may be sold in such manner as the court may direct; and when a purchaser

(n) Stat. 13 Eliz. c. 4., and stat. 27 Irish stat. 21 and 22 Geo. III. c. 20. Eliz. c. 3. are incorporated in the

shall be found, the conveyance shall be made to him by the remembrancer of the court, or his deputy, by direction of the court, by deed of bargain and sale to be inrolled in the same court; and by s. 2., it shall be lawful for that court to order the production and delivery of title-deeds, in the same manner as if a decree had been made for the sale of the lands of a crown debtor, in execution of a trust for payment of debts by the crown debtor himself.

By the 48 Geo. III. c. 58., (which does not extend to Ireland,) bailbonds taken in the king's suits may be assigned to the king, and be sued on as on bonds originally made to the king.

The king is not bound by the statute of frauds; therefore, an extent at his suit binds from the teste of the writ, or more properly the fiat of the baron on which it issues. (o) So also, the king is not affected by the acts relating to bankrupts; and the goods will be bound from the teste, notwithstanding the bankruptcy of the debtor. (p) Immediate extents among themselves take place according to the teste, and cannot be antedated: but they may be issued either in term or in vacation; because they issue from the equity side of the exchequer, which is always open. (q)

An extent in aid is a writ issued at the instance of the king's debtor for the recovery of his own debt, i. e. of a debt originally due to him: but this being of an inferior nature is postponed to an immediate extent. (r) The doctrine, however, of the crown process having priority where it bears *teste* on a day subsequent to a subject's execution on a *fieri facias*, under which the sheriff has seized, and before sale applies to extents in aid; the principle in both cases being that, until the property is altered by sale and delivery, the crown process is to be preferred. (s)

This doctrine as to immediate extents rests on the decision of the case of *The King v. Wells and Allnutt*, (t) before Lord C. B. Macdonald. Upon a recent occasion, (u) it was attempted to shake this decision upon an interlocutory motion: but the court adhered to the decision, although they admitted that, if the argu-

(o) *R. v. Pavy*; Bunb. 39.

6 Price Exch. R. 144.

(p) *Cro. Car.* 149, 451.

(t) 16 East. 278. *in notes*.

(q) *R. v. Mann*, 2 Str. 749.

(u) *The King v. Sloper and Allen*,

(r) *Parker* 281.

6 Price, 116.

(s) *Re in aid of Patterson v. Sloper*,

ments brought forward against it had been urged in support of such a question arising on the record, and to be more solemnly decided, they would have required further time to form a mature opinion. The reporter adds that this case (*The King v. Sloper and Allen*) had in different ways come very often before the court. There had been, from time to time, much discussion as to the fittest mode of bringing it fully under the consideration of the court, that the question might receive the fullest investigation : but certain objections have always, hitherto, stood in the way of putting the matter on the record. In the same note, however, it is intimated that it was the acknowledged opinion of C. B. Thompson and the court, as then constituted, that the decision in *The King v. Allnutt* could not be shaken, but by the highest authority ; since which the point has been raised in the *King v. Giles*, and decided by three barons against Wood, dissentient, in favour of the crown : but it is understood that the point will be carried to a higher tribunal. (v)

By the stat. 57 Geo. III. c. 117. (regulating the issuing of extents in aid) it is now provided that they cannot be sued out by simple contract debtors to the crown, or by bond-debtors for any particular duties payable in the course of their trades or callings ; nor by any subdistributor of stamps ; nor by any surety for a debtor to the crown, until demand has been made on such surety ; and then only to the extent of such demand. But the statute does not extend to simple contract debts of collectors of the revenue, where one or more of them is bound by bond or specialty of record in the exchequer for the payment of the same. (x) So also, where a party is entitled to an extent in aid, he may still issue it for a simple contract debt, the statute having made no distinction with respect to the nature of the debt due to the crown debtor.

On an extent in chief the crown may seize debts due to the debtor *in infinitum* : but, on an extent in aid, debts cannot be seized beyond the third degree. In reckoning the degrees, however, the debt due to the debtor of the crown debtor is the first. (y)

More precision is required in an extent than on an elegit, in describing the land extended ; for a term cannot be extended for

(v) 8 Price 293.

(y) 1 Price 93.

(x) 2 Tidd. 1084.

the king's debt without shewing in the inquisition the commencement and certainty of the term; and the reason is, that after the king's debt is satisfied, the party shall have his term again if any remain; and upon this the party shall have the writ of *amoveas manum* against the king or any other. (z)

On the return day of the writ of extent, whether in chief or in aid, or as soon after as the writ is actually returned, a rule or order is entered on the back of it by the prosecutor's clerk in court that, "if no one shall appear and claim the property of the goods, &c. mentioned in the inquisition on or before that day se'nnight, a writ of *venditioni exponas* shall issue to sell the same. If no one appear and claim the property within the time limited by the rule, the *venditioni exponas* issues to the sheriff commanding him to sell the goods for the best price he can obtain. If the produce of the goods, sold under the extent, be not sufficient, the court will make an order for sale of the debtor's lands under the stat. 25 Geo. III. c. 35.

The writs of execution which have been mentioned are the most usual: but mention is often made of a *levari facias*, as well in the superior courts as the inferior. A *levari facias* is the most ancient process of the law, and appears in the books by several names. In mesne process it is called an attachment of goods and distress infinite: but in executions it is always called a *levari*. The executions of the common law were originally only pains or seizures to compel obedience to the process of the court. In process of time in the king's courts they went further; and the modern *levari* in the superior courts authorizes the sheriff to sell as well as seize the goods and lands of the defendant. In inferior courts, the ancient way of levying as a pain continues to this day, except where by special custom it is otherwise.

A *levari facias* may be either for the king or the subject. It may be issued at common law for levying a fine or debt to the king. (a) This writ may also be sued out of the Court of Exchequer for levying penalties, arrears of taxes, or the issues and profits of lands returned by the sheriff on a special *capias ulaga-*

(z) Palmer's case, 4 Rep. 74. a.
R. v. Rawlins, Bunb. 71.

(a) R. v. Woolff, 2 B. & A. 609. R.
v. Webb, 2 Show. 166.

tum, (b) in which latter case it has been holden that the cattle of a stranger, *levant and couchant*, may be taken and sold under it. (c) So if lands be seized under an extent, process of *levari facias* may be issued to levy the rents half-yearly, or oftener if required, until the principal debt with costs and damages are satisfied. (d)

A *levari facias* for the subject is either upon a recognizance, or statute merchant, or statute staple, or statute in the nature of statute staple. Or there may be a special *levari* against an heir on the obligation of his ancestor, where he confesses the debt, and the particulars of the assets descended. It is sometimes called a special *elegit*, because the value of the lands must be determined by a jury. (e)

A recognizance is an obligation of record taken before some court of record, or a magistrate duly authorized. A recognizance at common law is not a perfect record till it is enrolled in some court of record: but since enrolment is merely for safe custody, recognizances at common law bound lands from the time of the caption. (f) Recognizances by statute are statutes merchant or staple, or are in the nature of a statute staple by stat. 23 Hen. VIII. c. 6. A statute merchant is a bond of record acknowledged before the mayor of London, or chief warden of some other city or town, or before one of the clerks of the statute merchant, pursuant to the statute of Acton Burnel, (g) enforced and amended by stat. 13 Edw. I. st. 3. *De Mercatoribus*. A statute staple is a similar bond acknowledged before the mayor of the staple pursuant to the stat. 27 Edw. III. st. 2. c. 9. A recognizance in the nature of statute staple is the same as the former, only acknowledged before other persons.

The stat. 27 Eliz. c. 4. s. 7. (h) requires an entry of the whole tenor and contents of all statutes, merchant and staple, within six months after acknowledgment, in the office of the clerk of the recognizances, (in Ireland, in the Court of Chancery); and by sect. 8., if it is not delivered to the clerk or his deputy within four months after acknowledgment, the statute is void against purchasers.

(b) 2 Tidd. Pr. 1065. See *post*.

(c) *Britton v. Cole*, 1 Lord Raym.

305.

(d) *Gilb. Exch.* 170.

(e) *Ibid.* 31.

(f) 2 Saunders. 7. (5). and the cases there cited by Sergeant Williams.

(g) 11 Edw. I.

(h) Stat. 10 Cha. I. sess. 2. c. 3. Irish.

By statute 29 Cha. II. c. 3. s. 18. (i) the day and year of the enrolment of recognizances are required to be set down on the margin of the roll; and no recognizance will bind lands in the hands of any *bona fide* purchaser, and for valuable consideration, but from the time of the enrolment. The mode of enrolling the recognizances in the nature of statutes staple is regulated by stat 8 Geo. I. c. 25. s. 1.

The execution on a recognizance at common law was a *levari facias*, in the ancient form, merely as a pain: but since the stat. Westminster II. (k) it seems that on a recognizance at common law, the plaintiff may proceed either by *levari facias* or *elegit*. (l)

On a statute merchant the first process was, after it was certified into chancery, a writ of *capias si laicus*, if the defendant was a layman; and if the sheriff returned the death of the party, or *non est inventus*, then a writ issued to extend the land returnable into either the King's Bench or Common Pleas; and the sheriff might thereupon deliver the lands to the conusee without the delay of a *liberate*. (m) If the conusor was a clerk, the sheriff was directed to levy the debt of his moveable goods and chattels. (n)

On a statute staple, or recognizance in the nature of a statute staple, if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, after the certificate under seal in chancery, is a writ in nature of an extent to take the body, lands, and goods. This writ is returnable into chancery; and the same sort of proceedings are had under it for extending the lands as upon an *elegit*. But the sheriff, after the extent, cannot deliver the lands to the conusee; but must seize them into the king's hands: and, in order to get possession, the conusee must sue a *liberate* out of chancery; and, in order to obtain actual possession, must proceed by ejectment. (o)

By stat. 32 Hen. VIII. c. 5. (p) if parties, claiming under extents and writs of execution, are evicted before they are satisfied, they may have *scire facias* out of the same court against the persons against whom such writs or extents issued, their heirs, executors, or assigns, returnable forty days after date; and if no

(i) Irish stat. 7 W. III. c. 12.
s. 17.

(k) Stat. 13 Edw. I. c. 18.

(l) 2 Tidd. Pr. 1115.

(m) F. N. B. 180. A.

(n) 2 Satnd. 70. b. Wms.

(o) 2 Tidd. Pr. 1116.

(p) Irish stat. 10 Cha. I. sess. 3. c. 7.
extended by stat. 26 Geo. III. c. 31.

cause is shewn, new writs may issue to levy the residue of the debt and damages.

By statute 8 Geo. I. c. 25. s. 4., (q) it is enacted that if it shall appear, before or after the filing or returning of any *liberate*, that sufficient has not been levied to satisfy the recognizance, or that any omission or error has happened in suing out, executing, or returning any of the said writs, or any process thereon, or that any lands shall be evicted from any person who shall have extended the same by virtue of such process, the chancery shall issue re-extents, and liberates may be sued thereon.

By statute 16 and 17 Cha. II. c. 5., (r) (made perpetual by stat. 22 and 23 Cha. II. c. 2.), it is provided that when any judgment, statute, or recognizance, shall be extended, the same shall not be avoided by occasion that any part of the land extendible is omitted out of the extent; saving always to the parties extended remedy for contribution against the persons whose lands are omitted. By sect. 3. it is provided that the act shall not be construed to extend to give any extent or contribution against infant heirs, in respect of lands descended, farther or otherwise than might have been before the act. And sect. 4. limits the operation of the act to such statutes only as are or shall be for the payment of money; and to such extent as shall be within twenty years after the statute, recognizance, or judgment obtained.

If one becomes bail in an action of debt and judgment is afterwards given against the principal, no extent can be of the lands of the bail *bona fide* aliened after his becoming bail, and before judgment against the principal; for the bail's recognizance is not in a sum certain, but only that if judgment be given against the defendant, and he does not pay the condemnation or render his body to prison, *tunc concedit quod debitum, &c.*; so that, unless the first part happen, it is no recognizance. It is otherwise in C. B. where the recognizance of bail is always in a sum certain, and against them consequently, execution may be had of all lands which they had when they entered into the recognizance. (s)

On a general judgment against the heir, on the obligation of his ancestor, the execution may be general also against the defend-

(q) No similar Irish statute.

26 Geo. III. c. 31. s. 1. Irish.

(r) Irish stat. 17 and 18 Cha. II. c.

(s) *Baskerville v. Bocket*, Cro. 11., rendered more effectual by stat. Jac. 449. 3 Danv. 317.

ant, his goods, and chattels, or a moiety of his lands by *feri facias* or *elegit*: but, where the judgment is special, the execution is so likewise, by a writ in the nature of an extent to levy the debt and damages of all the lands descended. And it seems that on a general judgment, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands; yet he may also at his election surmise that the heir has certain lands by descent, and pray execution of the whole. (t)

In debt against the heir on the obligation of his ancestor the obligee might at the common law extend all the land descended to him; and now, since the statute of frauds, this will extend to estates *pur autre vie*, where the heir takes as special occupant. But the heir in such cases cannot have a contribution from a purchaser of his ancestor, although the purchaser should come to the land without consideration. And yet the heir is charged as terretenant, and not as heir. But the heir at common law shall have contribution against the heir by custom; for they are *in equali jure*: and the heir *ex parte paterna* shall have contribution from the heir *ex parte materna*. (u) So if several men be severally seized of land, and join in a recognizance, the conusee cannot extend the lands of any one of the conusors separately, because they are equal in degree; for, although the land of the conusor may be separately charged when other men have purchased the land, yet that is because the conusor is not equal in degree with the purchaser. If the conusor's land is not sufficient, then the purchasers must contribute in equal degree. In the same case it was said, that when one purchaser being extended alone should have contribution, it was not intended that the others should allow or give him any thing; but that the party so charged might by *scire facias*, or as the case required defeat the execution; and should thereby be restored to the mesne profits, and compel the conusee to sue execution of the whole land: and thus the land of every terretenant should be extended. (x) But this is now altered by the above statute 16 and 17 Cha. II. c. 5.

By outlawry in civil actions the defendant forfeits all his goods and chattels, and the profits of his land, to the king; his personal

(t) 2 Tidd. 1118.

(x) *Ibid.*

(u) Herbert's case, 3 Rep. 12.

chattels immediately, and his chattels real and the profits of his land when found by inquisition of office, which as to the chattels real and the land seems to be an office of entitling. (y) By the general writ of *capias utlagatum* the sheriff is commanded only to take the defendant; but under the special writ he must impanel a jury, and make inquisition of his goods and chattels, including his leasehold and freehold land; they must appraise the goods, and extend the land. After inquisition he must take possession of the leasehold lands in the defendant's own occupation: but he can only take the issues and profits of the freehold. After the inquisition is returned, and the record is perfected in the court out of which the *capias* issues, a transcript is sent into the Exchequer, out of which a *venditioni exponas* issues to sell the goods and chattels, and to levy the issues and profits. If the outlawry be reversed, the property, if in the king's hands, shall be restored by *amoveas manum*: for the outlawry being reversed, it is as if there was no record, and the interest of the crown is but conditional. The sale, however, is good, if the outlawry be good; and the property, if a term of years, will be bound, into whatever hands it comes. (x) And the same law is of outlawry for felony or treason. (a)

Where (b) a termor, having mortgaged his term, became outlawed, and the term was sold under a *venditioni exponas*, but no notice was given to the mortgagee who was not in possession, the court seemed inclined to think the mortgagee might plead to the inquisition; for otherwise he should be without remedy; for the term was bound by the inquisition, and seized into the king's hand; and the validity of the inquisition could not be tried in an ejectment, since the king's title could not be so tried.

In cases of outlawry in civil actions it is said that a lease for years is forfeited without seizure; and therefore if it be sold before seizure, and after outlawry, the king may avoid the sale: (c) but the sale must be understood to be before office; for the king has no interest in a chattel real till office. (d)

(y) 3 Salk. 262. Co. Litt. 128. Britton v. Cole, 12 Mod. 177. The Attorney General v. Freeman. Hard. 101. Windsor v. Sewell, Tho. Raym. 17. But see 2 Salk. 469. and Bunb. 103.

(x) Eyre v. Woodfine, Cro. Eliz. 278.

(a) Ognel's case, Cro. Eliz. 270:

(b) R. v. Blunt, Bunb. 104.

(c) Anon. 12 Mod. 438.

(d) Britton v. Cole, 12 Mod. 176.

Outlawry in a capital case being an attainder and conviction, it creates an absolute forfeiture of all the real and personal estate of the party so attainted and convicted. In cases of treason real estate of inheritance is forfeited to the king, and in the case of felony it goes to the lord by escheat: but if a man, having an estate *pur autre vie*, commit treason or felony, the whole is forfeited to the crown. (y) So also, although the lord have by charter all felons' goods, a lease for life shall nevertheless be forfeited to the king upon an attainder of felony. (z)

Where A., being possessed of a term for eighty years, settled part of the premises, in trust for himself for life, with divers remainders over; provided that if he had issue, the trusts should cease, and assigned the residue, with a power of revocation; it was held A.'s life interest only was forfeited by his committing treason, and that the power of revocation created no trust in favour of the king, because the power was inseparable from the person having it. (a) The relation in the case of forfeiture of lands is to the time of the offence committed, although an office of instruction be necessary to put the king in possession: but with respect to goods and chattels, in which must be included leases for years, the forfeiture only relates to the conviction, or to the time of awarding the exigent. But then the very issuing of the writ of exigent gives the king the forfeiture from the time of issuing the exigent. The king's title likewise being by the exigent, which is of record, cannot be done away without a special writ of error, though the outlawry be reversed: for the exigent being of record, must be reversed by matter of as high a nature. (b)

Judgment creditors, and vendees from the sheriff under the several writs of execution which have been mentioned, are called involuntary assignees; because the judgment or other process operates against the will of the tenant. There is one other species of assignment, which has also the same effect, and has

(y) Bac. Law Tracts, edit. 1741. 13 a.

p. 189.

(b) Co. Litt. 43. 228. b. Stamford

(z) Bac. Law. Tr. 148.

Pleas of the Crown 184. 5 Rep.

(a) Smith v. Wheeler, 1 Mod. 68. 111. a. Makes' Pl. Crown, Vol. I. The Duke of Norfolk's case, 7 Rep. 360, 362.

indeed been called a statutable execution; and that is the assignment of a bankrupt's estate, or an insolvent's property to assignees for the benefit of creditors under the several acts passed for that purpose.

The trading necessary to bring a person within the operation of the bankrupt laws (c) is thus described by the stat. 21 Jac. I. c. 19. s. 2.: every person that uses the trade of merchandize (by way of bargaining, exchange, bartering, chevizance, or otherwise) (d) in gross or retail, or seeking his or her livelihood by buying and selling, (or dealing in exchange, Irish statute,) or that shall use the trade or profession of a scrivener (receiving other men's monies or estates into his trust and custody) (e) (or salesmaster, Irish statute), shall be liable to be made a bankrupt. The stat. 5 Geo. II. c. 30., made perpetual by the stat. 37 Geo. III. c. 124., subjects bankers, brokers and factors, to the bankrupt laws; but excepts farmers, graziers and drovers as such (f) (or receiver general of taxes, Irish statute). A pawnbroker is a broker within the act; and, although he has ceased to take goods in pledge, yet if he sell the unredeemed goods, he carries on the trade. (g)

One single act of buying and selling will not make a man a trader, if there be no general intent to get a livelihood by it: (h) so on the contrary, if there be such general intent, the extent of the trading is not material. (i) It is unnecessary to mention all the obvious instances of trading, which may subject a man to the operation of these laws: but it may be useful to mention those which are more immediately connected with the contract between landlord and tenant. A man whether a termor or freeholder, who sells bricks made from the produce of his land, is not a trader of this description: but he is, if he purchases the materials of his manufacture. (k) So where a brickmaker took the earth off the

(c) See stat. 11 and 12 Geo. III. c. 8. Irish, which incorporates all the preceding English statutes.

(d) Not in the stat. 11 and 12 Geo. III. c. 8.

(e) Not in the Irish statute.

(f) Sects. 39 and 40.

(g) *Rawlinson v. Pearson*, 5 B. and A. 124.

(h) *Holroyd v. Gwynne*, 2 Taunt. 176.

(i) *Patman v. Vaughan*, 1 T. R. 572. *Bartholomew v. Sherwood*, 1 T. R. 573. *Ex parte Moule*, 15 Ves. 602. *Ex parte Magennis*, 1 Rose, B. C. 84.

(k) *Ex parte Gallimore*, 2 Rose B. C. 424.

waste, and made bricks and sold them, paying afterwards a consideration for the earth so taken, he was held to be within the bankrupt laws. (l) So where (m) a man made bricks for sale from clay dug upon land, which he held for a term of years, and buying sand and fuel, which were necessary ingredients to convert the clay into brick, he was held to be a trader within the bankrupt laws. The distinction laid down in this case by the court of King's Bench, who reversed the decision of the court of Common Pleas, was, that if a man exercise a manufacture upon the produce of his own land as a necessary or usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he should not be considered a trader, though he bought materials as ingredients, as in the case of a farmer who makes cheese, though he buy runnet and salt; or the case of a man making his own apples into cider. But where the produce of the land is merely the raw materials of a manufacture, and used as such, only as the mode of raising the produce of the land, and is an insignificant article compared with the whole expense of manufacture, there he is in truth and ought to be considered as a trader. The bankrupt in the principal case took the brickground with a view to carry on the trade of brickmaker for public sale. The land produced nothing; the lease was merely a purchase of the clay, and just the same as if he had bought it by so much a load: he had nothing to do as a farmer; his sole object was making bricks for sale, and therefore must be considered a trader. With respect to this case it is but proper to state, that the judgment of Lord Loughborough in the Common Pleas, so overruled by the court of King's Bench, has always been considered by the profession as having been governed by sounder principles than that of the court of King's Bench. The question was afterwards carried to the House of Lords, (n) who adjudged that a *venire de novo* should be awarded on the ground that the verdict was insufficient to give judgment upon. Afterwards it was agreed that this action could not proceed; and a new action was brought which also came to no specific termination, because it appeared that the bankrupt had left off brickmaking before the petitioning creditors' debt accrued. Another commission was afterwards taken out by a

(l) *Ex parte* Harrison, 1 Bro. Ch. Ca. 173.

(n) 1 Cooke B. L. 51. 1 Bro. P. C. 545.

(m) *Parker v. Wells*, 1 T. R. 34.

creditor prior to his quitting brickmaking, which was submitted to. (o) The subsequent case however of *Sutton v. Woolley*, (p) as far as it goes, appears to shake the authority of the decision of the court of King's Bench; where a devisee for life of an estate, part of which was brickground, made bricks there for sale generally with a view to profit; and he was declared not a trader, though he purchased the coals, and some of the wood used in burning bricks, and had occupied the same ground as a brick-maker for general sale before the estate came to him by devise; and the ground on which the court decided was, that it was but a more beneficial mode of enjoying his own estate by carrying the soil to market in a meliorated state.

A maker of alum cannot be a bankrupt (q) neither can the lessee of a coal-mine who works the coals and sells them, for this is only buying and selling an interest in land: (r) but if he sells the coals from the mine together with others that he buys at market, he becomes a trader within the bankrupt laws. (s) In the case of *ex parte Gallimore*, (t) the lessee was supplied with coals of a particular denomination and quality from a neighbouring mine, which in its then present state his own did not afford him. And he insisted that when his own mine was in a state to produce coal of the species borrowed, the agreement was that he should return coal for coal. Lord Eldon said that it was a question for a jury whether this was an incidental occasional dealing, or whether it manifested a purpose of trading in the articles of other persons. There were many cases, he observed, in which, attending to the doctrines and principles laid down in them, it would be difficult to support the present commission upon such a trading. Take the case of a farmer in the West of England who converts his apples, the fruit of his orchard, into cider; and, not having a sufficient supply from his own orchard, makes up the deficiency *de anno in annum* by purchasing apples of his neighbours: it has been held that such a buying would not make him a bankrupt.

The proprietor of a quarry delivering or cutting stones for sale is not a trader; (u) neither is the lessee of a farm on which is a

(o) 1 Cooke B. L. 53.

(s) See *supra*, 2 Wils. 170.

(p) 7 East. 442.

(t) *Supra*.

(q) 1 Cooke B. L. 46, 60.

(u) *Ex parte Gardiner*, 1 Ves. and

(r) *Port v. Turton*, 2 Wils. 169.

B. 45.

lincolnr which he works as a limeburner; (x) neither can an inn-keeper (y) or victualler, (z) who sells necessaries and liquors in his house, or in small quantities out of the house as all publicans do, be made a bankrupt.

In the case of *Mills v. Hughes*, (a) soon after the passing of the stat. 5 Geo. II. c. 30. s. 40. (b) a "drover" was held to be one who employed himself in buying and selling cattle. But in *Bartholomew v. Sherwood*, (c) where a farmer sought his living by buying and selling horses collaterally to his business as farmer, he was adjudged to be within the bankrupt laws, because this was held not to be within any of the denominations of farmer, grazier, or drover. If, however, a farmer purchases hay for his cattle, and sells part of it again, because it is more than is required for their consumption, this will not make him a trader. The line of distinction seems to be whether the extent of the horse-dealing is or is not more than can be fairly incidental to his farming. Therefore a farmer who occasionally bought hay, corn, horses, and pigs, with a view to sell again for profit, which were incident to the occupation of a farmer, was held not to make himself thereby a trader within the bankrupt laws. (d) Whether he is a licensed horsedealer or not is not material. (e)

A farmer who buys potatoes, and sells them with others raised upon his own land, may be made a bankrupt on such a trading. (f)

The legislature has by several statutes declared what are acts of bankruptcy, the nature of which is more fully discussed in treatises on the subject of bankruptcy: it may however be remarked, that as the motive by which the trader is actuated in each particular case is the chief guide of construction as to acts of bankruptcy, all assignments, with the intention to defraud or delay creditors from their just debts, are in themselves acts of bankruptcy, as well as all grants and conveyances which

(x) *Ex parte Ridge*, 1 Ves. and B. 360.

(y) *Newton v. Trigg*, 3 Mod. 329.

(z) *Saunderson v. Rowls*, 4 Burr. 2067.

(a) *Willes*, 568.

(b) See *supra*.

(c) *Bolton v. Sowerby*, 11 East. 274.

(d) *Stewart v. Ball*, 2 N. R. 78.

(e) *Ex parte Gibbs*, 2 Rose B. C. 38. *Wright v. Bird*, 1 Price 20.

(f) *Mayor v. Archer*, 1 Stra. 543.

are void or voidable under the stat. 13 Eliz. c. 4., or the stat. 27 Eliz. c. 7. (g)

A commission of bankrupt was formerly held to be an action and execution in the first instance : (h) but a commission of bankrupt is not now treated as an execution at law, for the effects brought in are under the administration of the court of Chancery, which has both legal and equitable jurisdiction in bankruptcy; and the distribution accordingly is made rateably in respect of both legal and equitable claims. (i) A commission, however, is more extensive in its nature than an execution : for an execution only passes what the sheriff seizes ; a commission divests all the rights and possibilities of the bankrupt.

It is no objection to a commission of bankruptcy, that it was taken out for the purpose of defeating an execution ; for such a purpose may be legally and honestly entered upon. (k) And a commission may be sealed in the night to prevent an extent for a debt due to the crown. (l)

The commissioners are empowered, by different statutes on this subject, to sell and convey all lands, tenements, and hereditaments, which the bankrupt is entitled to at the time of the bankruptcy, whether freehold or copyhold, in fee or fee tail for life or for years, rents, annuities, reversions, remainders, or any future or contingent interest in land, to assignees appointed for that purpose, as well as every description of personal property to which the bankrupt is legally or equitably entitled at the time of the bankruptcy, or which he may become entitled to previous to obtaining his certificate. (m)

If a bankrupt be seized in right of his wife, the commissioners may sell his interest during the coverture if it be freehold property, and all the interest in leasehold ; (n) and if there be two joint-tenants, one of whom becomes bankrupt, it seems this is a

(g) 2 Com. Dig. C. 8.

(h) *Twiss v. Massey*, 1 Atk. 67. *Ex parte Wilson*, *ib.* 153.

(i) *Ex parte Elton*, 3 Ves. 338. *Ex parte Storks*, 3 Ves. and B. 105.

(k) *Ex parte Bowes*, 11 Ves. 541.
- *Ex parte Arrowsmith*, 14 Ves. 209.
Ex parte Gardner, 1 Ves. and B. 45.

(l) *Castell's and Powell's Bankruptcy*, cited in *Wydown's case*, 14 Ves. 87.

(m) Stat. 34 and 35 Hen. VIII. c. 4. stat. 13 Eliz. c. 7. stat. 1 Jac. I. c. 15. stat. 21 Jac. I. c. 19. and stat. 5 Geo. II. c. 30.

(n) 2 Com. Dig. D. 11.

dissolution of the jointure, because the bankrupt's moiety is bound by the statutes; and the commissioners may by the stat. 1 Jac. I. c. 15. proceed against the bankrupt's estate, if he dies, in such sort as if he were living, which they could not if there were any survivorship. (o) But where freehold lands become vested in the bankrupt as heir, a specialty creditor has the same right to pursue the assets under the bankruptcy, or their specific produce in the hands of the assignees, as if the heir had not become a bankrupt. (p) So if lands are bargained and sold for valuable consideration by a trader before bankruptcy, the commissioners cannot convey such lands, although the enrolment is not perfected till after the bankruptcy. (q)

It may be here observed that the words "at the time of bankruptcy" relate to the act of bankruptcy upon which the commission issues; and therefore, generally speaking, the conveyance under the commission will pass all the property of a bankrupt, which he had at the time he committed such act of bankruptcy. So also every disposition of the property of a bankrupt in contemplation of bankruptcy, to prefer a particular creditor, is fraudulent and void: but by stat. 21 Jac. I. c. 19. no purchaser *bona fide* for a valuable consideration can be affected even by a previous act of bankruptcy, unless the commission be sued out within five years after such previous act of bankruptcy. (r) Now also by the stat. 46 Geo. III. c. 135. all conveyances by, and all contracts by and with a bankrupt, *bona fide* made and entered into more than two calendar months before the date of the commission, are good and valid, notwithstanding any prior act of bankruptcy, provided the party dealing with the bankrupt had not at the time any notice of any prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. An execution having been considered not within this last statute, (s) by the stat. 49 Geo. III. c. 121., all executions and attachments against the lands and tenements, goods and chattels of the bankrupt, *bona fide* executed or levied more than two months before the date and

(o) 1 Cooke B. L. 279. Whitm. B. L. 76.

(p) *Ex parte Morton*, 5 Ves. 449.

(q) *Audley v. Halsey*, W. Jon. 203.

(r) *Spencer v. Venacre*, 1 Keb. 722. *Radford v. Bludworth*, 1 Lev. 13.

(s) *Blagg v. Phillips*, 2 Campb. N.P.C. 129.

issuing of the commission, is placed in the same situation as conveyances and contracts are by the stat. 46 Geo. III. The effect of these statutes therefore may be thus stated: a purchaser *bona fide* for valuable consideration, and without notice of a prior act of bankruptcy, is protected by them, if his contract is made two months before the issuing of the commission; and a purchaser *bona fide* for valuable consideration, without notice of a prior act of bankruptcy, is protected, even if the contract or conveyance is made within two months of the issuing of the commission, if that commission has not been issued within five years from such act of bankruptcy. (t) A purchaser by marriage articles is within the stat. 21 Jac. so as to defend himself in equity. (u) In a recent case (v) it has been held that the issuing of a commission is not of itself a sufficient notice, as to all the world, of a prior act of bankruptcy.

The stat. 21 Jac. c. 19., as has been observed, requires that the purchaser should be without notice of the prior act of bankruptcy: but it seems that the notice of the execution of a fraudulent deed, although such fraudulent deed may be an act of bankruptcy, is not a sufficient notice of the act of bankruptcy, because every fraudulent deed is not an act of bankruptcy, but only such deeds as are intended to defeat or delay creditors. (y) A commission issued, although it is afterwards superseded, is sufficient notice of an act of bankruptcy under the statutes 46 and 49 Geo. III.

A subsequent act of bankruptcy will not defeat the interest of the creditors acquired under a prior act; therefore if after one act of bankruptcy another is committed by an outlawry, and the king makes a lease of the profits of the bankrupt's lands, the outlawry and lease will not prejudice the creditors of the bankrupt: but if the commission be sued out above five years from the first act of bankruptcy, the assignee of the king's lease is a purchaser within the stat. 21 Jac. I. c. 19. (x)

Counts of equity do not favour the avoidance of purchases by

(t) See *Radford v. Bludworth*, 1 Lev. 13. *Spencer v. Venacre*, 1 Keb. 722.

(u) *Read v. Ward*, 7 Vin. Abr. 119.

(x) *Sowerby v. Brooks*, 4 B. and A. 523.

(y) *Read v. Ward*, *ubi supra*.

(z) *Rain v. Teap*, 1 Salk. 108.

relation to the act of bankruptcy: therefore, although the court will compel the disclosure of the consideration, it will not compel the purchaser to shew the time, for fear it should overreach it, and be within the time after an act of bankruptcy committed. (a)

By the stat. 21 Jac. I. c. 19. s. 9. lands of which an extent or execution is served, and executed before a trader becomes bankrupt, cannot be conveyed or assigned by the commissioners. Nor can lands be assigned if a statute be extended upon them, though the *liberate* was not sued before the bankruptcy: but the writ and inquisition must be returned. The teste (b) or delivery of a *fi. fa.* (c) to the sheriff will not create a lien: but seizure (d) by the sheriff on a *fi. fa.* before the bankruptcy is a valid service and execution to prevent the assignment of the commissioners. (e)

If a trader merely deposits his lease as a security before bankruptcy, this is no bar to a conveyance, because no legal title is thereby transferred to the creditor. (f) But if the bankrupt purchase a lease, and part of the purchase money is not paid, nor delivery of the possession made at the time of the bankruptcy, the vendor has a lien on the estate for the sum. (g) So on a general principle every vendor has a lien on the estate of his vendee or assignee for the purchase money, and may obtain an order for sale, and prove the difference against the estate of the bankrupt. (h)

The possession and power of disposing of goods and personal chattels, as distinguished from chattels real, are the only evidence of ownership to which persons dealing with traders look; therefore the stat. 21 Jac. I. c. 19. has been particularly directed to remedy the mischief arising from a trader's holding out a delusive responsibility to the world; and has consequently made "possession" a criterion of ownership, so as to subject such chattels to

(a) Anon. Skinn. 149.

Lefr. 425.

(b) Bayley v. Bunning, 1 Lev. 173.

(f) Doe d. Maslin v. Rob, 5 Esp.

(c) Phillips v. Thomson, 3 Lev. 69.

N. P. C. 105.

191. Smallcomb v. Cross, 1 Ld. Raym. 251.

(g) Chapman v. Turner, 1 Vern. 267. Bowles v. Rogers, 1 Cook B. L.

(d) Cole v. Davies, 1 Lord Raym.

123. *Ex parte* Hunter, 6 Ves. 94.

724. Sloper v. Fish, 2 Vea. and B. 146.

(h) Grant v. Mills, 2 Vea. and B.

(e) See *in re* Warren, 2 Scho. and307. *Ex parte* Gwynne, 12 Vea. 379.

the bankrupt laws. But with respect to real estates possession is no such evidence of title, as may induce creditors to rely upon it: for they may be mortgaged, and the mortgagor usually remains in possession. (i) Mortgages of land, therefore, will not be affected by this statute. The same privilege of exemption is extended to utensils of trade fixed to the freehold.

The words of the stat. 21 James I. c. 19. are:—"And for that it often falls out that many persons before they become bankrupt do convey their goods to other men upon good consideration, yet still do keep the same and are reputed owners thereof, and dispose of the same as their own, be it enacted that if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall become bankrupt shall, by the consent of the true owner and proprietor, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition of them as owners: that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose of the same to and for the benefit of the creditors which shall seek relief by the said commission as fully as any other part of the bankrupt's estate."

The only case almost under this part of the act last mentioned, which bears immediately on our subject, is that of *Horn v. Baker*. (k) A., B., and C., partners and distillers, occupied certain premises leased to A. and another person; and they used in common in the trade the stills, vats, and utensils, for carrying it on; the property of which stills and utensils afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and another person (D.) should carry on the business on the premises; and by deed between A. and the two last it was covenanted and agreed that A. should withdraw from the business, and permit C. and D. to use, occupy, and enjoy the distill-house and premises, paying the reserved rent, and the several stills, vats, and utensils of trade specified in the schedule annexed, in consideration of an annuity to be paid by C. and D.

(i) *Ryal v. Rolle*, 1 Atk. 168. 7 T. R. 228. *Lingham v. Biggs*, 1 B. Gordon v. The East India Company, and P. 82.

(k) 9 East. 215.

to A. and his wife, and the survivor of them, with liberty for C. and D., on the death of the survivor of A. and his wife, to purchase the distill-house and premises for the remainder of A.'s term, and the stills, vats, and utensils mentioned in the schedule. And C. and D. covenanted to keep the stills and vats in repair, and to deliver them up at the end of the term, if not purchased; and there was a proviso for re-entry, if the annuity should be in arrear for more than two months. Under this deed C. and D. took possession, and made payments of the annuity, which afterwards fell in arrear for more than two months: but A.'s executrix and widow did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and D., who continued in possession of the stills and vats, and other utensils in the schedule mentioned. In this case, the property being disputed by the assignees of the bankrupts, it was held; 1. that the stills, which were fixed to the freehold, did not pass to the assignees as goods and chattels under the statute. 2. That the vats, which were not so fixed, did pass, as being left by the true owner in the possession, order, and disposition of the bankrupts, as reputed owners. But, thirdly, that the case might have been otherwise, if the usage of the trade had been to let out utensils to traders, as that might have rebutted the presumption of ownership arising from the possession, order, and disposition of them.

The conveyance of the bankrupt's freehold estate must be by deed indented and enrolled in one of the courts of Westminster, and must be executed by a majority of the commissioners: but if any such estates come to the bankrupt between the issuing of the commission and the confirmation of his certificate, there must be a new conveyance. (l) The commissioners are said to have no estate, but only a power which must be executed by the means prescribed by the statute; or otherwise no part of the estate can pass. (m) Nothing passes before enrolment; neither does the deed, which is usually a bargain and sale, when enrolled, relate to the act of bankruptcy. (n) Although the statutes do not specifically mention a time for enrolment, the safer way is to enrol the bargain and sale within six months, in the same way as other bargains and sales. There is, however, room for a distinction,

(l) *Ex parte Proudfoot*, 1 Atk. 253.

(n) *Elliott v. Danby*, 12 Mod. 3.

(m) *Perry v. Bowes*, Tho. Jon. 196. *Bennett v. Gandy*, Carth. 178.

since the commissioners do not convey any interest, but merely execute a power.

The assignment of personal property need not be enrolled, and it vests all the bankrupt's present and future property, between the assignment and the confirmation of his certificate, in his assignees; and the bankrupt cannot afterwards recover, release, or discharge the same. (o)

The general assignment of a bankrupt's personal estate does not, however, vest a term of years in his assignees, unless they do some act to manifest their assent to the assignment as it regards their acceptance of the estate; and the same observation applies in principle to the bargain and sale of the bankrupt's freehold property. The bargain and sale of the freehold property and the assignment of the personal is the execution of a statutable power by the commissioners given to them for a particular purpose, *viz.* the payment of the debts of the bankrupt. Nothing passes from them; for nothing was previously vested in them: whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. The acceptance therefore of any estate which might be a charge on the creditors could not be within the scope of the trust or duty of the assignees; and in this respect such property, whether leasehold for years or for lives, differs from the debts of the bankrupt or his unincumbered estate and effects.

The assignees must elect to take peremptorily. (p) No formal election is necessary: but it may be presumed from their acts *in pais*. (q) Entry and occupation generally, without protesting in the first instance that they do not take possession as assignees of the lease, seems to be sufficient to bind them, although the bankrupt's effects remain on the premises, and they deliver up the key after the effects are sold. (r) So any other voluntary act, such as payment of rent, will be evidence of tenancy; and if the tenancy is put in issue in an action of replevin between the assignees and the bailiff of the lessor, and the jury find that the assignees are tenants, this verdict will be conclusive evidence between the landlord and

(o) *Ex parte* Proudfoot, 1 Atk. 252.
 Evans v. Mann, Cowp. 569. Ashley
 v. Kell, 2 Stra. 1207. Kitchen v.
 Bartsch, 7 East. 53.

(p) *Hanson v. Stevenson*, 1 B. & A.
 303.

(q) *Thomas v. Ketteridge*, 7 Taunt.
 206.

(r) *Hanson v. Stevenson*, *supra*.

assignees on an action for rent. So dealing with the property as owners by selling it will bind them ; (t) although merely advertising it, without stating that they are in possession, will not have that effect. (u) So where assignees found a purchaser, and received a deposit, although the contract was afterwards abandoned, without the assignees, however, shewing why they did not enforce it, Gibbs, C. J. thought under the circumstances, the assignees were bound. (x) But where the assignees allowed the bankrupt's effects to remain on the premises nearly twelve months after the bankruptcy, and for the purpose of preventing a distress paid the rent due, intimating at the same time to the landlord, that they did not intend to take the lease unless it could be advantageously disposed of; and soon after the effects were sold and removed the lease was put up to sale by order of the assignees, but there were no bidders for it; although the assignees omitted to return the key for four months, (which, however, was not demanded;) it was held they were not bound as assignees of the lease. (y)

Where the assignees, being chosen on the eighth of the month, permitted the cows of the bankrupt to remain on the premises (which were pasture ground) till the tenth, and ordered them to be milked there; Lord Ellenborough, C. J. held that the assignees thereby became tenants; and, consequently, that the cows were liable to distress (z) for rent accrued subsequent to such acceptance.

A release to the undertenant of all liability during the residue of his term for rent, or in respect of covenants reserved or contained in the underlease by the assignees, has been held to be no acceptance of the original lease. (a) In all cases of implied acceptance, it must be recollected that the acts from which the acceptance is implied are merely evidence of acceptance. In that light the release in question might be evidence of acceptance: but it appears in this case that, shortly after the release in question, (24th June, 1817,) the assignees received a notice (4th July) from

(t) *Hancock v. Welsh*, 1 Stark. N. P. C. 290.
P. C. 347.

(u) *Page v. Godden*, 2 Stark. N. P. C. 310.

(x) *Turner v. Richardson*, 7 East. N. P. C. 368. R. v. Stoke, 2 T. R. 335.

(z) *Hastings v. Wilson*, 1 Holt.

(y) *Wheeler v. Bramah*, 3 Campb.

N. P. C. 340.

(z) *Welsh v. Myers*, 4 Campb.

N. P. C. 368. R. v. Stoke, 2 T. R. 451. R. v. Bampton, 4 T. R. 348.

(a) *Hill v. Dobie*, 8 Taunt. 325.

the plaintiff to elect whether they would accept the lease ; upon which they immediately wrote to the plaintiff, positively refusing to accept it. Upon any other principle the case seems to be questionable ; for the release could only be valid upon the supposition of their having accepted the interest out of which the underlease was derived.

If the assignees occupy after having suspended their election in equity, they will be liable to pay rent as long as they retain possession. (a) And if they elect to take the lease, they cannot afterwards renounce, because it turns out a bad bargain. (b)

Before the stat. 49 Geo. III. c. 121. a lessor could not compel the assignees to make their election : another inconvenience, likewise was, that where they accepted the lease the bankrupt, although deprived of all his property, remained liable to all the obligations of the contract. In *Wadham v. Marlow*, (c) indeed, a plea of bankruptcy before that statute was held to be a bar in debt for rent : but that decision depended more on the form of action, than upon any general principle. An action of covenant, however, might have been brought in all cases for non-payment of rent accrued after his bankruptcy, notwithstanding his certificate ; (d) and assumpsit lay on parol holdings on the same principle : (e) for in *Mills v. Auriol* (f) it was held that a bankrupt lessee, though out of possession, was liable on his covenant to pay rent ; and there is no distinction in this respect, in principle, between an action of covenant and assumpsit on a parol lease. (g)

The stat. 49 Geo. III. c. 121. has provided that where assignees accept the lease, the bankrupt shall not be liable for rent accrued after such acceptance, or for any breach of covenant ; and if the assignees, on application, decline to make their election immediately, the lessor, his heirs or assigns, may apply, by petition, to the Lord-Chancellor. If the assignees refuse to accept the lease, and deliver the indenture or other writing to the lessor, such a delivery on their part is a determination of the lease by

(a) *Ex parte Maundrell*, 2 Madd. Ch. Ca. 315.

(b) *Turner v. Richardson*, 7 East. 335.

(c) 1 H. Bl. 437. : but more fully reported in 8 East. n. c. p. 314. Can-

trell *v. Graham*, Barnes 69.

(d) *Mills v. Auriol*, 4 T. R. 94.

(e) *Boot v. Wilson*, 8 East. 314.

(f) 1 H. Bl. 439. affirmed in K. B. 4 T. R. 94.

(g) *Boot v. Wilson*, 8 East. *supra*.

virtue of the same statute. (*h*) In *ex parte* Scott (*i*) the Lord Chancellor gave the assignees ten days to make their election.

An order may be made under the stat. 49 Geo. III. on the petition of the landlord to deliver up possession, and to execute a surrender of the bankrupt's benefit in the lease, although it has been deposited in the hands of a third person as a security: but the assignees cannot be ordered to deliver up the indenture of lease, because they have no power over it. (*j*)

In *ex parte* Quantock (*k*) the Vice-Chancellor was of opinion that this statute did not empower the Lord Chancellor to determine whether the assignees had made their election. The counsel for the assignees being called upon rejected the lease; and, on affidavits being read, shewing that the assignees had mismanaged the farm, since they had been in possession, an issue was directed of *quantum damnificatus*.

Where the bankrupt was tenant for years, and the landlord, being also assignee under the commission, without having determined the tenancy by a notice to quit, got the wife of the bankrupt to leave the house, and let it to a new yearly tenant; it was held that he was not entitled to retain the rent reserved on such new letting; but that it should be carried to the credit of the bankrupt's estate. (*l*) So if an assignee purchase the estate of a bankrupt, without the consent of the creditors, he will be responsible for the profit or loss to the estate. (*m*)

An action of trespass by *clausum fregit* is maintainable by a tenant from year to year, who has become bankrupt after the trespass, and before the commencement of the suit; and the right does not pass by the assignment to his assignees unless they interfere; since the bankrupt may sue as a trustee for, and has a good title against all but them. (*n*)

If a surety enter into a bond with a principal, conditioned for the performance of covenants, contained in an agreement for a lease, such surety is still liable; although the principal become

(*h*) *Ex parte* Nixon, 1 Rose, B. C. 445. *Ex parte* Maundrell, 2 Madd. C. C. 315. *Ex parte* Whittington, 1 Buck. B. C. 87.

(*i*) 1 Rose, B. C. 446. n.

(*j*) *Ex parte* Clunes, 1 Madd. Ch. Ca. 76.

(*k*) 1 Buck. B. C. 189.

(*l*) *Ex parte* Wright, 2 Rose B. C. 244.

(*m*) *Ex parte* Lewis, 1 Glyn and Jameson, 69.

(*n*) *Clark v. Calvert*, 3 B. Moor. 96

bankrupt, and be discharged under the 49th Geo. III. c. 121. s. 19, (o)

The taking the benefit of an act for the relief of insolvent debtors, in consequence of which the property of the insolvent becomes vested in his assignee, has sometimes been called a voluntary assignment, because the law is not compulsory on the debtor to execute the assignment, as in the case of the statutes affecting bankrupts. The act of the 1st of the present king, c. 109. (p) (which relates to England only), provides that prisoners in custody for debt may apply by petition to the court of insolvent debtors, constituted and erected by that act, in a summary way for a discharge; and, upon filing their petition, they shall at the time of subscribing such petition duly execute a conveyance and assignment in such manner and form as the court shall direct of all the estate, right, title, interest, and trust, of such prisoner, in and to all the real and personal estate and effects of such prisoners, except wearing apparel and other necessities, not exceeding the value of 20l.; so as to vest all such real and personal estate and effects in the provisional assignee of the said court; subject to a proviso, that in case such prisoner shall not obtain his discharge by virtue of the said act, such conveyance and assignment shall from and after the dismissal of the petition of such prisoner, praying for his discharge, be null and void to all intents and purpose. By the seventh section of the same act it is provided that, when the court shall adjudge any prisoner to be entitled to his discharge, it shall appoint a proper person or persons to be assignee or assignees of the insolvent for the purposes of the act; and when such assignee or assignees shall have signified to the said court their acceptance of the said appointment, every such insolvent's estate, effects, rights, and powers, vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees appointed by the court, as lastly before mentioned, in trust for the benefit of such last mentioned assignee or assignees, and the rest of the creditors of every such insolvent. (q)

A man will be liable to express covenants after his discharge under an insolvent act, unless there is a clause therein to save

(o) *Inglis v. Macdougall*, 1 B. Moor. Page *v. Bussel*, 2 M. & S. 551.

198. *Welsh v. Welsh*, 4 M. & S. 333. (p) Sect. 4.

Martin v. Brecknell, 2 M. & S. 39. (q) Irish act, 1 and 2 Geo. IV. c. 59.

him from future payment; and the last mentioned act appears to contain no such clause. (r)

By the 11th section of the stat. 56 Geo. III. c. 50. it is provided that no assignee of any bankrupt or any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person or persons engaged in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands; or any manure, compost, ashes, seaweed or other dressings intended for such lands, and being thereon in any other manner and for any other purpose than the tenant could have done.

By the stat. 47 Geo. III. stat. 2. c. 4. estates of traders, within the meaning of the laws relating to bankrupts, are liable to their debts in the hands of their heirs or devisees, as well debts by specialty as by simple contract: but it is provided that, in the administration of the assets in equity, the specialty creditors are to be preferred. By sect. 2. it is provided that this act shall not repeal the bankers' act in Ireland, (33 Geo. II. c. 14. Irish). But the act has been held not to apply to a case where the deceased had left off trade two years before his death. (s)

The next species of assignments which may be mentioned are those which take effect by mere operation of law on some collateral event, such as marriage or death, which alters the relation of the parties.

Estates *pur auter vie*, the property of a *feme sole*, being freehold interests, are not a gift in law to the husband by marriage. He has, however, an interest during the coverture in right of the wife, which is extendible for his debt, and may be forfeited on his outlawry. But all terms for years, which a feme covert is entitled to in her own right, are by marriage an absolute gift to the husband; not indeed without the possibility of reverting to the wife: but the husband may by deed dispose of them during his life. They are likewise extendible for the debt of the husband; and, if he be outlawed or attainted, they are considered gifts in law for the

(r) *Marks v. Upton*, 7 T.R. 305.
Cotterell v. Hooks, Dougl. 97.

(s) *Hitchon v. Bennett*, 4 Madd. 180.

benefit of the king. If the wife survives, and the husband has made no disposition of the term during his life, she will be entitled to it absolutely, paramount to all collateral charges by the husband during coverture: if the husband survives the wife, the term becomes his absolute property. (t) If a term be settled in trust for the separate use of the wife, previous to marriage, the wife may bequeath it without the consent of her husband, notwithstanding coverture; and the ecclesiastical court may be compelled to grant a probate of such a will. (u)

It has been said that marriage will not entitle an alien husband to a term vested in the wife: but there has been no decision on this point. In one case (v) the subject was pressed on the court by the attorney-general on behalf of the crown: but the court gave no answer; probably, as the reporter observes, because the decree did not concern any right which the king might have, it being only to stay proceedings at law, and to quiet the plaintiff in his possession. The only reason advanced by the opposite side why a term should not be a gift by marriage to an alien husband was, because the wife might sue and be sued as a *feme sole*, notwithstanding her marriage with him. A better reason, perhaps, might be grounded upon the well known rule, that an act of law operates to the prejudice of no person; and, consequently, the gift of the term being the legal effect of marriage might not take place in this case; because it could only operate to the prejudice of the wife, by giving the king the benefit of the forfeiture on office found.

If the wife is entitled to chattels real in *auter droit* as executrix or administratrix, although her marriage entitles the husband to the disposition of them during the coverture; yet, after her death, they will not become his property, but will go to the administrator *de bonis non* of the testator or intestate under whom the wife claimed. Such terms are, moreover, not extendible for the debt of the husband, neither are they subject to the consequences of his attainder or outlawry. (x) A bequest also of such

(t) Co. Lit. 351. a. *Young v. Radford*, Hob. 3. Lane 55.

(v) *Theobalds v. Duffoy*, 9 Mod.

(u) *Taylor v. Rains*, 7 Mod. 148.

102. Com. Dig. Alien C. 4.

Stone v. Forsyth, Dougl. 707. *Fettiplace v. Georges*, 1 Vca. J. 46. *Rich*

(x) Co. Litt. 315. a. *Ridler v. Punter*, Cro. Eliz. 391.

v. Cockell, 9 Vca. 387. *Wikes's case*,

property, without her husband's consent, will vest it in the executor of her will. (y)

Where the husband has a legal right to his wife's personal estate, equity will not interfere : but where there has been no settlement previous to marriage, or a settlement without contemplating the property in question, and the husband and those claiming under him cannot obtain possession of such property without the assistance of a court of equity ; the wife is entitled to a reasonable provision, which is called her equity : and the same principle has been extended to children. (x) But this equity is personal to the wife, and the court acknowledges no original title in the children : they can claim, therefore, nothing but what she secures to herself. An actual settlement is not, however, necessary to give title to the children ; and if there be a decree in a cause referring it to the master, although the wife die, yet the settlement must be made to the children ; yet even after such a decree, and the approval of the settlement by the master, the wife may waive it before execution ; neither does the wife's equity depend on the decree ; therefore, where she died pending the suit, the children were held entitled. (a)

This equity has been recognized as against the husband ; (b) and his assignees, if bankrupt ; (c) and an assignment for valuable consideration will not bar it : (d) and on this ground injunctions have been granted to stay proceedings in the spiritual court against an executor for a legacy due to the wife. (e) From all the cases it appears to be immaterial who applies to the court. (f) The wife, however, may be examined, as in the case of a fine and consent to her husband taking the whole ; and if previous to marriage a settlement has been made of the husband's property, in consideration of the wife's fortune, her portion, though consisting

(y) *Roberts on Wills*, Vol. II. 153.

(z) See 5 Ves. 737.

(a) *Hemmatz v. Halthin*, 1 Gl. and Jam. 64.

(b) *Milner v. Colmer*, 3 P. Wms. 638. *Adams v. Peirce*, 3 P. Wms. 11. *Brown v. Elton*, 3 P. Wms. 202.

(c) *Jacobson v. Williams*, 1 P. Wms. 382. *Bosvill v. Brander*, 1 P. Wms. 459. *Beresford v. Hobson*, 1 Madd.

Ch. Ca. 362. *Basevi v. Serra*, 3 Meriv. 674.

(d) *Macaulay v. Phillips*, 4 Ves. 15. Like *v. Beresford*, 3 Ves. 506. *Hill v. Atkinson*, 4 Ves. 530.

(e) *Meales v. Meales*, 5 Ves. 517. *Harrison v. Buckle*, 1 Str. 239, *Winch v. Page*, Bumb. 86.

(f) 1 P. Wms. 459.

of choses in action, is considered as purchased by him, and will go to his executors. (g) So also, if an equitable interest is given to the wife for her life only, the court of chancery will permit the husband to enjoy it, without the consent of the wife, and without making any provision for her; (h) and a purchaser for valuable consideration from the husband will be protected against her.

Choses in action, the property of the wife, may be assigned by the husband; but the property will not be altered without a valuable consideration. The trusts of terms for years which are in the nature of choses in action, indeed, seem to be an exception: (i) but, in *Macaulay v. Phillips*, (k) the master of the rolls made a *quære*, whether a trust of a term of years could be assigned; so as to exclude the wife surviving, without a valuable consideration.

But where the husband and wife were divorced *a mensa et thoro*, the court of chancery granted an injunction to restrain the husband from selling his wife's term. (l)

In a case reported (m) in Bunbury's reports, it appeared that a term for years had been assigned before marriage to trustees on trust to make leases for the benefit of the husband and wife: after marriage the husband and wife assigned to one Sparke, in consideration of building the premises; and Sparke assigned over his interest for valuable consideration. After the death of the husband, the wife brought her bill in equity to be relieved against this lease, it having been made during coverture, and no fine levied. And *nota*, adds the reporter; this bill must have been dismissed, as the proper remedy was at law: but that the defendants filed a cross-bill to be quieted in their possession, and for an injunction against any proceedings at law. It was insisted for the defendants in the original bill, that this lease being assigned by the husband and wife, who were *cestui que trusts*, should bind in equity as much as if it had been assigned by the trustees. And *per curiam*: if the trustees had been parties, they should have been decreed to execute the trust to the defendants, pursuant to the

(g) Prec. in Ch. 62. 3 Vern. 501.
Prec. in Ch. 412. Garforth v. Bradley, 2 Vez. 677. 2 Ves. J. 607.

(h) See Elliott v. Cordell, 5 Madd. Ch. Ca. 149.

(i) Sir Edw. Turner's case, 1 Vern.

7. Pitt v. Hunt, 1 Vern. 18. Tudor v. Samyne, 2 Vern. 270. Walter v. Saunders, 1 Eq. Abr. 58.

(k) 4 Ves. 15.

(l) Anon. 9 Mod. 43.

(m) Rouse v. Atkinson, Bunb. 162.

assignment of the *cestui que trust*. Secondly, it appeared that the plaintiff in the original bill was present during the rebuilding, and took no notice of her interest: but this appeared to be only during the coverture. Thirdly, it was said, that the plaintiff after her husband's death had affirmed the lease, by acceptance of rent: but of this there was no proof. For the plaintiff it was urged that she had both law and equity on her side, which ought to prevail against the equity alone: but to this it was answered, that the trustees were trustees for the defendants, who had the equitable interest. On the whole the original bill was dismissed, and an injunction decreed on the cross-bill: and, per Lord C. B. Eyre, "Sparke was a purchaser for valuable consideration by building. Nor does he appear to have had notice: but if he had I should have been of the same opinion."

It has been a matter of much controversy, of late years, whether it is absolutely necessary that the wife's chose in action should be reduced into actual possession, during the life of the husband, in order to render his disposition of it valid. In the case of *Hornsby v. Lee* (n) Sir Thomas Plomer, then vice-chancellor, decided, that where the husband and wife had assigned a reversionary interest of the wife in certain truststock, or security for the payment of an annuity granted by the husband, and the person on whose death the wife was to take died, and then the husband died without doing any other act to reduce the stock into possession, the wife was entitled by survivorship, both against a partner and a general assignee under an insolvent debtor's act, the benefit of which the husband had taken in his lifetime. It should, however, be remarked, that this case has not met with the approbation of the profession: and the inclination of the present vice-chancellor seems to be decidedly against its authority. (o)

In a recent work (p) by Mr. Roper, he lays down the following rule. An assignee of the husband for valuable consideration of the wife's choses in action, whether they be immediately recoverable or be in remainder, or expectant upon an event which may

(n) 2 Madd. 16.

(o) *Elliott v. Cordell*, 5 Madd. Ch. Ca. 140.; and *Stamper v. Barker*, 5 Madd. Ch. Ca. 157. See also Observations on a case lately submitted to

Counsel, &c., by Tho. Canning, Esq.

(p) Treat. on Husb. and Wife, p. 235. 1st vol. See also Mr. Canning's observations on the case of *Hornsby v. Lee*.

trators, and such executions should be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, should not be liable to such execution. (d) There may now be an executor *de son tort* of such an estate for lives, since they are made personal assets by the statute of frauds. (e)

Terms for years, including tenancies from year to year, and all minor interests of a fixed duration, form a part of the personal estate of every testator and intestate, and vest as assets in the executors or administrators by act of law. So, although a creditor having a lien on a lease keeps possession of it, it is notwithstanding assets in the hands of the administrator who has the power of redeeming it. (f) Leasehold estates in Ireland are likewise personal assets in England, and may be sold here. (g)

The legal estate in the assets is given to the executor solely for the purpose of paying the testator's debts; (h) and although a man may have two executors, one as to his chattels real, and the other as to his chattels personal, they are with respect to creditors but one executor, and may be sued jointly. (i) The executor cannot devise or bequeath them; for if he dies, having made a will, his executor will take them immediately from the first testator; and if he die intestate, they will go to the administrator *de bonis non*. They are not subject to extents to the crown for his debt, nor liable to his bankruptcy; (k) neither can they be taken in execution by the sheriff on a *fi. fa.* (l)

Executors and administrators are bound by the privity of contract of their testators or intestates, and consequently are liable in the same degree as long as they have assets; (m) not-

(d) See 1 P. Wms. 777. Mitf. Ch. Pl. 108. *Shuttleworth v. Laywick*, 1 Vern. 245. *Powis v. Corbett*, 3 Atk. 556. *Troughton v. Troughton*, 1 Vez. 87.

(e) *Bradburn v. Kennardale*, 3 Mod. 331.

(f) *Vincent v. Sharp*, 2 Stark. N.P.C. 507.

(g) See *Bligh v. Lord Darnley*, 2 P. Wms. 622.

(h) *Wentw. Off. Ex.* 8.

(i) *Rose v. Bartlett*, Cro. Car. 293.

(k) 3 Burr. 1369. *Plow.* 516. 525. b.

(l) *Ridler v. Punter*, Cro. Eliz. 291. *Farr v. Newman*, 4 T. R. 621. *Dalt. Sher.* 146. *Gilb. Ex.* 31. *Cadogan v. Kennett*, Cowp. 432. F. N. B. 87. E.

(m) *Coghill v. Freelove*, 3 Mod. 325. *Ventr.* 210. 1 Bl. Rep. 441. *Simmons v. Bolland*, 3 Meriv. Ch. Ca. 547.

withstanding the lessee has aliened in his lifetime. If the lessee has not aliened in his lifetime, they are not at liberty to waive the term without renouncing the whole administration; (n) and having once elected to administer, they then become liable out of their own proper goods for the rent and breaches of covenants running with the land, as long as the privity of estate continues: for nothing shall be assets but the surplus profits of the land; and therefore the profits of the land proportionate to the rent being taken to his own use, the executor or administrator is chargeable for it as his own debt. And it cannot be presumed in law that the land is of no value: but, on the contrary, the land shall be intended *prima facie* to be of greater value than the rent; (o) and if it should be of less, it may either be alleged specially, in order that a suitable abatement may be made, (p) or he may have the benefit of it by giving it in evidence. (q)

It may, however, be remarked that, although the general doctrine on the subject seems to be as has been just stated, yet there is some confusion in the earlier cases. In the case of *Clements v. Waller* (r) it was said in argument, "that a judgment in covenant against an executor ought to bind the effects of the testator only, even where the breach is in the time of the executor, as is fully settled in *Collins v. Thoroughgood*, Hob. 188., and in *Bridgeman v. Lightfoot*, Cro. Jac. 671." Now this seems to be a mis-application of the principle of the cases cited to the case of *Clements v. Waller*: for the question in *Clements v. Waller* was whether the executors of the lessor (a spiritual person) were liable *de bonis propriis* on a covenant of warranty, in a lease not warranted by the Irish stat. 10 and 11 Car. I. c. 3.; on which point there can be little doubt. But in *Collins v. Thoroughgood* (s) covenant was brought against an executor,

(n) *Caly v. Jocelyn*, Al. 34. *Royston v. Cordrye*, 322. 42. *Paule v. Moody*, 2 Roll. Rep. 121. *Bolton v. Cannon*, 1 Ventr. 271. *Sackville v. Evans*, 1 Froom. 171. *Tinney v. Norris*, Carth. 519.

(o) *The Bailiffs of Ipswich v. Martin*, Cro. Jac. 411. *Lord Rich v. Frank*, Cro. Jac. 222. *Hargrave's case*, 5

Rep. 31. *Anon.* 1 Brownl. 56. *Maule v. Moody*, Palm. 116.

(p) *Maule v. Cacyffyr*, Cro. Jac. 546. *Howse v. Webster*, Yelv. 103. *Billinghurst v. Spearman*, 1 Salk. 297.

(q) *Jevens v. Harridge*, 1 Wms. Saund. 1. n. 1.

(r) 4 Burr. 2124.

(s) Hob. 188.

and the breach assigned was for default of reparation committed in the time of the executor, and damages having been assessed, it was moved whether the judgment should be *de bonis propriis*; and upon view of the precedents, the reporter observes, it was judged *de bonis testatoris*; for *nota*, says he, that it is the testator's covenant which binds the executor as representing him; and therefore he must be sued by that name. (x) *Bridgeman v. Lightfoot* (y) was as follows:—The testator of the defendant being possessed of an advowson in gross for a term of years, covenanted that he would not assign his interest without offer thereof to the plaintiff; and the breach was that the executor assigned without giving such notice, and the judgment was *de bonis testatoris* only. From several other cases, (z) however, the difficulty appears to rest in the manner of pleading; for the executor or administrator in possession is chargeable as assignee as well as executor; and if he be so charged, he will be liable *de bonis propriis* for all breaches of covenant running with land wilfully committed by him during his occupation.

In a late case (a) it is stated that the defendant administered to the tenant under an agreement; and on the sixth of February, 1815, paid to the plaintiff (the landlord) one year and a half's rent due on Christmas day, 1814, which was after the lessee's death. On the thirtieth of December, 1814, he had sold 40,000 bricks from off the premises; and caused a board to be put up and to remain on the premises for several months, denoting that the ground was to be let or sold, and referring for information to his (the defendant's) agent. No offer was made by the defendant to give up the premises to the plaintiff till eight months after the intestate's decease, and then only a verbal offer was made. The estate was insolvent, and the defendant had received no profit from the premises. In an action for use and occupation he was charged in his own right for rent due after the decease of the lessee. The court held that he was not chargeable. Dallas, J. delivered the judgment of the court; and observed,—“the defendant can only be liable as the personal representative of his brother

(x) 3. C. Hetl. 171.

(y) Hutt. 54.

(z) *Castillon v. Smith*, Hutt. 35.

1 Brownl. 24. *Tilney v. Norris*,
Carth. 519. 1 Salk. 309. 1 Lord

Raym. 553. *Buckley v. Pirk*, 10
Mod. 12. 1 Salk. 317.

(a) *Remnant v. Brambridge*, 3
Taunt. 191.

(the lessee) who died intestate. The plaintiff sued the defendant generally, and did not describe him as an administrator in the declaration. He must, therefore, be considered to have made his election, and charged the defendant as an assignee. Some evidence was given at the trial that the defendant had taken possession of the premises after the death of the intestate; and that eight months after the death he offered by parol to give up possession of the premises, or surrender the interest to the plaintiff; but that the plaintiff had taken no notice of such offer, as it was not made in writing. It is quite clear that the plaintiff, not having sued the defendant as administrator, could not recover from him in that capacity; and it is equally clear that if the defendant were not in possession, he could not be liable to discharge the rent *de bonis propriis*. For, in the first place, he might have pleaded, that the premises were of less value than the rent; and, secondly, that he had no assets. It is unnecessary to determine whether it was requisite for him to plead the latter, as it was not proved that the defendant had such assets. The only question then is, whether he (the defendant) can be considered as having taken possession of the premises or not? The note of Serjt. Williams (*Jevens v. Harridge*, 1 Saund. n. 1) goes to shew, that if the defendant had failed in proving that the premises had been productive of no profit, he might then have shewn he had no assets; and that if the premises were of less value than the rent, he was not bound to plead it specially, but might have the benefit equally by giving it in evidence. It was clearly proved at the trial that he had derived no benefit from the premises in question. The court at first doubted whether, as it appeared that he had taken possession, it was necessary that he should surrender the premises to the plaintiff by an instrument in writing: but we are now of opinion that the offer to give up the possession by parol was sufficient; and, consequently, that a surrender in writing was unnecessary."

In the marginal abstract of this case it is stated generally that the intestate was lessee of the premises in question, an inaccuracy of some importance with reference to the opinion of the court thus expressed in the latter part of its judgment. The defendant was, it must be remembered, assignee of a tenant under an agreement only; he was at most, therefore, only a tenant from year to year. The next important fact is, that the estate of

the lessee was insolvent. There were, therefore, no assets probably to administer. Either of these facts may give a colour to the doctrine here advanced. Although the statute of frauds has required the surrender of a written lease to be in writing, there seems to be no objection to a parol surrender of a parol tenancy from year to year : or if the court meant to say, that the administrator waived the administration altogether, it does not appear that there is any law which requires that such waiver should be in writing. But if we suppose a surrender in writing to be necessary in ordinary cases, and the position before laid down be accurate, that an executor or administrator cannot waive the term without waiving the whole administration ; if the defendant did not waive the administration, he became actual tenant, and his surrender must have been in writing, as it would have been in all ordinary cases.

If a lessee mortgages his term, and then dies, the equity of redemption is assets in equity for the payment of debts generally. (b) Therefore, if after the mortgage the termor become indebted to the same person on simple contract, the executor cannot redeem without paying the simple contract debt as well as the mortgage : (c) but it is otherwise, where any creditor of the testator brings his bill to redeem ; there he shall only pay the mortgage money. On the same principle the bond of the ancestor becomes the debt of the heir, if he be special occupant ; and therefore, if he comes to redeem a mortgage made by his ancestor, he must pay the bond as well as the mortgage debt.

After the death of the mortgagor of a term, the conusee of a judgment has a right to redeem from the conusee of a statute, who has taken an assignment of the term, without satisfying the statute ; for when the mortgagor dies, the equity of redemption is assets in equity ; and as the judgment shall be satisfied by assets in law before a statute, so shall it be in equity. And though the conusee of the statute has taken the assignment, yet that shall not take away the priority the judgment has in law. (d)

If an administrator mortgages the term of his intestate, and makes his executor, and dies, his executor or administrator shall

(b) *Watts v. Thomas*, 2 P. Wms. 777. See *Anon.* 2 Vern. 177. 364.

(d) 2 Freem. 90.

(c) *Coleman v. Winch*, 1 P. Wms.

redeem, and not the administrator *de bonis non*, because the administrator aliened the whole interest in law, and was in possession in his own right. (e)

If an executor or administrator assign over his interest, he still remains liable by reason of the privity of contract; although he is no longer liable out of his own estate, but only so long as he has assets of his testator or intestate. (f)

Where a term is specifically bequeathed, it will, notwithstanding, in the first instance vest in the executor by virtue of his office, for the usual purposes to which the testator's assets should be applied; and the legatee cannot enter till he has the executor's special assent. The power of selling, which an executor may exercise even before probate, is incidental to his office; the law making the person of the executor liable in cases of *devastavit*, although in cases of collusion the assignee of the executor is liable as well as the executor. In equity the fund is liable, except as against a purchaser for valuable consideration, without notice. And the Court of Chancery will set aside a collusive assignment.

An administrator *durante minori ætate* cannot sell leases except for special reasons; as where there are no other assets for the payment of debts. (g)

If one enter on the land leased for years, after the death of the lessee, dying intestate before administration granted, it seems that he will be considered executor *de son tort*: (h) and, indeed, there seems to be no other way in which he can become an executor *de son tort* with respect to a term of years; for with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry. (i)

Where (k) in an action by administrator *de bonis non* against the administrator of an executor *de son tort* for the recovery of a term, the defendant pleaded that the executor *de son tort* had laid out in payment of debts money to a greater amount than the personal estate, the court held that this entitled him to retain the

(e) *Butler v. Bernard*, 9 Freem. 139.

(f) *Bachelor v. Gage*, Cro. Car. 188.

Helier v. Casberff, 1 Sid. 266. 1

Freem. 288. *Jenkins v. Hermitage*,

1 Freem. 577. *Joddrell v. Cowell*,

Ann. 343.

(g) *Prince v. Sympson*, 2 Ander.

132.

(h) *Vernat's case*, Clay 116.

(i) *Kenrick v. Burgess*, Moor. 126.

(k) *Baker v. Beresford*, 1 Keb. 285, 535, 595.

lease; and it was not necessary to shew that the executor *de son tort* paid money to this intent, for the property is altered without election of the party by operation of law; and if election were necessary, the administrator of the executor *de son tort* might make it.

Where (l) the lessee made B. his executor, who made three persons his executors, and died; and then the will of B. not having been discovered, administration *de bonis non* was granted to D., who assigned the term, and then B.'s will was discovered: it was held that, although the executor of B. afterwards renounced, yet the grant of the term in the mean time was not good, because the grant of letters of administration was altogether void *ab initio*; for as long as there is a will, and no renunciation by the executor, the ordinary has no power to grant such letters; because the property is already in the executor. And the relation cannot help it, because no act can be made good which was originally absolutely void for want of power. Where, (m) however, the letters of administration are not absolutely void in the first instance, but merely voidable, there a revocation of the letters of administration, and administration committed to another will not avoid the mesne acts of the first administrator. (n) Instances of this kind may easily be stated; as, for instance, where the letters of administration are granted to one who is next of kin, or not in the proper order: in these and the like cases the administration is not void, because at the common law the ordinary had a right to grant the administration to whom he pleased.

The purchaser of a leasehold estate from an executor need not see to the application of the purchase money, nor need there be any recital in the assignment to him of the purpose for which it is sold. But if on the face of the assignment it appears that it was made in satisfaction of the private debts of the executor, this will be a fraud against the persons interested under the will; and a court of equity will relieve against it, unless from length of time, or other circumstances, it may be presumed that the assets have become the property of the executor. (o) If the lessee dies in the middle

(l) *Abram v. Cunningham*, 2 Lev. 182.

(m) *Packman's case*, 6 Rep. 18. b.

(n) *Ibid.*

(o) *Bonny v. Ridgway*, 1 Cox 145.

Macleod v. Drummond, 17 Ves. 152.

Ray v. Ray, Coop. 264. *Aylesbury*

v. Hervey, 3 Lev. 204. *Hoyle v.*

Lundon, 3 Keb. 889. *Whale v. Booth*,

4 T. R. 625. n. (a)

of a quarter, the executor or administrator shall be allowed for the profits taken by the intestate during his life. (p)

We next come to assignments by the act of the party; which may be either by deed or other writing to take effect in the lifetime of the grantor, or by a specific devise or bequest in his will.

Agreements for the sale of leasehold interests may be enforced in equity in the same way as agreements for the sale of any other species of property. With respect, however, to the title of the lessor or the assignor, courts of equity can give no assistance to purchasers by way of enforcing the agreement, if the production of the lessor's title has not been a subject of express stipulation at the time of the contract. But it has been thought reasonable, on the other hand, that a purchaser without notice of the lessee's inability at the time of the contract should not be compelled by the vendor to complete his purchase. (q)

Where a good title can be made, subject to a pecuniary charge, the court may compel specific performance on the assignor's giving security against the charge: but in *Fildes v. Hooker*, (r) it was held that a lessee, subject to covenants, could not compel a specific performance, although he offered to indemnify the purchaser against the covenants; because in effect the vendor could not secure to the purchaser the specific property for which he had contracted, and only proposed to secure to him a pecuniary compensation in value in case he should lose the possession. If there is any delay after the agreement in enforcing the performance of it, equity will not apportion the price according to the time elapsed. (s)

If the vendor of a lease, in which is a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence. (t) So where the lessee assigned all his effects to B. for the benefit of creditors, and, among other things, a lease containing a covenant not to assign without licence, and B. agreed to assign to D.'s nominee; it was held that, to support an action on this agreement, B. must shew that

(p) *Mitchell v. Meese*, Skinn. 649.

(r) 2 Meriv. 424.

(q) Sugd. Vend. and Purch. 240.
4th edit.

(s) *King v. Wightman*, 1 Anstr. 80.

(t) *Crisp v. Lloyd*, 5 Taunt. 242.

he had the lessor's consent to assign, although D. had taken possession, cut down the crops, and paid part of the consideration. (u)

The licence need not be in writing unless the terms of the condition require it; and after it is once given, an assignment may be made in pursuance of it, even after the lessor has granted the reversion to another. (x) If, where the lease requires a written licence, the lessor gives a parol licence by way of snare, a court of equity will relieve on the ground of fraud. (y)

In a late case (z) the defendant purchased a leasehold estate at a public auction, subject to certain conditions of sale, which were "that the purchaser should immediately pay down a deposit in part of the purchase money, and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases without requiring the lessor's title, on payment of the remainder of the purchase money." Assumpsit was brought by the vendor against the purchaser for the nonperformance of the conditions of sale on his part. After a verdict for the plaintiff it was moved, in arrest of judgment, that the plaintiffs had not set out their title or averred a tender of a proper conveyance to the defendant. It was held that the plaintiffs were not bound to set out their title; and that allegations, that they were ready and willing to convey, and actually offered to convey, were equivalent to a performance of the conditions on their part. With respect to the first point it may be observed that it was clear that what the buyer did not stipulate for or require, the vendor was not bound to state. With respect to the second, namely, the default in averring a tender of an assignment, Dallas J. in delivering the judgment of the court, observed, "the rule is clear that if performance of an act be rendered impossible by the default of the one party, it dispenses with the necessity of the other party's averment, or proof of the fact; and if that rule be applied to this case, the objection vanishes. There is then a substantial right of action on the record; and whether the pleadings are so

(u) *Mason v. Corder*, 2 Marsh. R. 2 T. R. 430.
832.

(y) *Richardson v. Evans*, 2 Madd.

(x) *Walker v. Bellamy*, Cro. Jac. Ch. Ca. 218.

102. *Ros & Gregson v. Harrison*, (z) *Ferry v. Williams*, 3 Taunt. 68.

formally drawn, as to be good upon demurrer, it is not necessary now to consider ; for this motion is in arrest of judgment, when the omission of form, and even of substance, is aided by the verdict. The second (special) count differs from the first : in the second count nothing is said of the purchaser having conveyances without requiring the lessor's title ; but the agreement is set forth, that the one shall assign, and that the other shall accept ; and then comes an averment, not merely that the plaintiffs were ready and willing to convey and assign, as in the first count ; but that they actually offered to convey and assign, and that the defendant refused to accept. To this count it is objected, first, that there is no title specially set forth ; secondly, that title is not even generally alleged ; and, thirdly that there is no averment of the actual tender of any conveyance or assignment : and it is true that title in the lessor (vendor) is not alleged. It becomes, therefore, unnecessary to consider the distinction between title specially set forth, and title generally alleged. If it be urged that, under the facts of the case, such allegation would be necessary, and that the want of it would be bad on demurrer, the answer is, that we are not now to decide on demurrer, but on a motion in arrest of judgment ; to that ground, therefore, and to that only, must our consideration be confined. It becomes, therefore, necessary to refer to the agreement and breach, as stated in the second count of the declaration. The contract alleged is an agreement by the defendant to purchase, and by the plaintiffs to assign and convey, a certain leasehold estate of them, the plaintiffs ; and after verdict it must be taken that the contract alleged was proved. Nothing is said as to a title or right to convey : but it is insisted that, in legal construction, an agreement to assign and convey imports a right to assign and convey. Be it so for the purpose of argument ; for, if such be the construction which the law will put upon the contract, it must be taken that the assignment offered was of that description. It is sufficient to set forth in the declaration the agreement in the terms in which it exists. The same construction must be applied to the contract, and to the statement of the contract in the declaration and this is done in the present case. Supposing it necessary to prove under such an agreement an offer legally to assign, it must be taken after verdict that this was proved at the trial, inasmuch as without such proof, in the present view of the case, the plaintiffs could

not have recovered. As to the remaining objection, viz. the want of an actual tender, it will be sufficient to say that the objection becomes weaker when applied to the second count; than it was when applied to the first; for in this second count is alleged an actual offer to convey by the plaintiffs, and an actual refusal to accept such conveyance by the defendant. The case seems sufficiently clear: but if any illustration be required, it may be derived from *Mason v. Corder*, (a) the last case decided on this subject in this court. There, in an action upon an agreement to assign a lease, it was urged in arrest of judgment that the plaintiffs should have averred and proved, not only that he was ready to make a good title, but that it was in his power to have done so. A new trial was granted upon the merits, so that the case did not turn upon the point, whether the judgment ought to be arrested. But, in delivering the judgment of the court, Gibbs, C. J. said, "The action cannot be maintained, unless the plaintiff did offer, and was able and shewed that he was able to do that for which he agreed. Possibly the plaintiff may prove that circumstance on another trial, which does not appear in this report, that the plaintiff was in a condition to procure, and did procure, that which he was bound to procure, the assent of the lessor. Now it could not be done on a future occasion, if the want of such an averment would have excluded such proof; nor would it on the same ground have been proved on the trial had, and yet for want of such proof the new trial was ordered. Without, therefore, having in terms averred, the ability to make is involved in the averment of being ready and willing to make an assignment, and of having tendered and offered to assign; and becomes of necessary proof on the trial, to enable the plaintiff to recover. The rule being that whatever is sufficiently alleged to let in proof, and without which proof, the plaintiff must have failed, will be intended after verdict to have been proved."

In *Smith v. Wheeler*, (b) S. M. being possessed of a term of years assigned it on certain trusts to B. and C., of whom B. dissented: the plaintiff claiming under the demise of C. recovered. Lord Hale, as reported by Ventris, said, "C. is a good lessor, for the other trustee's disagreement makes the estate wholly his." The same opinion is given by Keble in these words. "The assignment

(a) *Ante*, 536. (b) 1 Ventr. 128. 2 Keb. 772.

being of a chattel is in both the assignees till the disagreement of B., and then is wholly in C." The doctrine here laid down by Lord Hale was adverted to in a late case (c) before Lord Eldon, on a bill filed by a vendee, for specific performance. The question was not properly raised on the record: but in effect it was, whether where there were three devisees of freehold estates in trust to sell, a release by one to the other two operated as a disclaimer, so as to enable the other two alone to make a valid conveyance to a purchaser. The case of *Crewe v. Dicken* (d) was cited. The Lord Chancellor said, that it had been taken for law from an older period than the date of *Crewe v. Dicken*, and sanctioned by Lord Hale, that if an estate is conveyed in trust to two persons, and one will not act as a trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and under his hand and seal declares that he disclaims, that is, disavows from being a trustee, the fact must be taken to be that he is no trustee: but in *Crewe v. Dicken* the difficulty occurred, that the party conveyed his estate to the other trustees. Lord Loughborough thought that that was different from a mere disclaimer, because he could not execute a release without having assented to the conveyance to himself. In that case there were also specialties: the individuals were particularly described, and the directions for the form of the receipt were such, as made it impossible that a proper receipt could be given, unless the trustee who had disclaimed, joined. If the essence of the act is disclaimer, and if the point were *res integra*, he should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and who thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer that the release amounts to more than a disclaimer is much more technical than any reasoning that deserves to prevail in a court of equity. At another day his Lordship observed, "the more one examines the distinction between disclaimer and release, the less one sees the worth of it. In this will, the testator declares that the receipt of the trustee or trustees, for the time being, shall be a sufficient discharge: but the shape of the

(c) *Nicholson v. Wordsworth*, 3 Swanst. Ch. Ca. 369. (d) 4 Ves. 97.

record is such that I cannot decide the question. My opinion is, that if a person, who is appointed a co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is a disclaimer, the distinction is not sufficiently broad for the court to act upon. What is the thing called a disclaimer? I have seen some prepared by the ablest conveyancers in a form like this:—“I hereby declare that I have disagreed, and hereby disagree, &c.; and hereby disclaim, &c.” What is the effect of that? That is sufficient. I can find no case which has decided, nor can I see any reasons for deciding that, where the intent of the release is a disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it.” The case in *Ventris*, his Lordship said, was an assignment of a lease to two persons, one of whom expresses his dissent: but, if we consider the difficulty attending conveyances to uses, he thought that he should be compelled to say that Lord Hale’s doctrine would not apply; and that a party could not disclaim in the case of a conveyance to uses, except by release with intent to disclaim. His Lordship was aware, however, that from the practice of conveyancers, if he were to say that on any difficulty in principle a disclaimer could not be effectual, he should shake titles innumerable. It appeared by the answer in this case that the trustee, wishing to disclaim, executed an indenture whereby he bargained, sold, released, quitted claim, and conveyed to his co-devisees, their heirs and assigns, all and singular the lands, tenements, and real estates of their testator. The following decree was taken by consent: “It appearing to the court that the release bearing date, &c., was meant to operate as a disclaimer, his Lordship doth declare that the defendant C. is not a necessary party to the conveyance, &c.” (e)

Where (f) the purchaser of an estate deposited a sum of money with an auctioneer, as part of purchase money, till the vendor could make out a good title, according to the conditions of sale; and afterwards no good title having been made, although the treaty pended four years with the auctioneer, during which no demand was made for repayment of the deposit: it was held that the auctioneer was not liable to the purchaser for interest on

(e) See *Townson v. Tickell*, 3 B. & A. 31.

(f) See *v. Munn*, 2 Term 45.

the deposit. Dallas, J. observed, that the question of an auctioneer's liability to interest had in many cases been raised, but in none decided. "The principal and auctioneer stand on very different ground. The principal contracts with a purchaser that he has a good title to the estate to be sold; and on the faith of that induces the purchaser to divest himself of the possession of his money: but the auctioneer's contract is only to hold the money; and, at the moment when one of the parties becomes entitled to it, to deliver it to such party. After failure to complete the contract, demand made on the auctioneer for the deposit money, and, refusal by him to return it, I should think that the purchaser might possibly be entitled to interest from the time of such refusal; and that the auctioneer would, under such circumstances, retain the money at his peril." The case of *Edwards v. Hodding* (g) was distinguished. It was decided on special circumstances; there the defendant was attorney to the vendors as well as auctioneer and was cognisant of the defect in the title, before he paid over the money to the principal. He paid it over nevertheless; and Dampier, J. held that the plaintiff was entitled to recover on that express ground. (h)

It may be here observed that the auctioneer is the authorized agent of both parties, under the statute of frauds. His receipt for the deposit, if he state the terms and essentials of the contract, or refer to (i) some writing by which the terms may be ascertained, is a sufficient memorandum of agreement. He is the authorized agent of the purchaser, although the purchaser has an agent to bid for him at the sale. (k)

Where A., having sold certain premises to B., assigned them by an indenture containing a proviso that B. should not assign over till the whole of the purchase money should have been paid; and B. and C. covenanted for themselves, their executors and administrators to pay the money; the premises having been taken in execution for the debt of B., who had not paid the purchase money, and sold by the sheriff to D., who paid a deposit, and

(g) 1 Marsh. 377. 5 Taunt. 312. 625. S. C. 1 Marsh. 252.
S. C.

(i) *Blagden v. Bradbear*, 12 Ves. 471. 13 Ves. 473. 7 East. 509.

(A) See *Burrough v. Skinner*, 5 Burr. 2639. *Calton v. Bragg*, 15 East. 223. *Maberly v. Robins*, 5 Taunt. 36.

(k) *Emmerson v. Heelis*, 2 Taunt.

agreed to complete the purchase on having a good title : it was held that the non-payment of the purchase money by B. was a sufficient objection to the title, to enable D. to recover back the deposit, in an action against the sheriff for money had and received. (*l*) So where (*m*) a landlord had given notice to the lessee under a covenant in the lease that he would re-enter if the premises were not put in repair within three months; and the lease was afterwards sold by auction, without informing the vendee of this circumstance: it was held that he might recover his deposit, although he knew the dilapidated state of the premises.

Where (*n*) there was a special agreement for the purchase of a house, which appeared to be neither stamped, nor signed by either of the parties, nor by the auctioneer, the vendee was held entitled to recover back his deposit, as money had and received. It was incumbent on the defendant to shew that, on the plaintiff's demanding his deposit, he tendered an assignment.

Where (*o*) A. agreed to purchase of B. the remainder of a term, and B. delivered to him the indenture of lease in order to have an indenture of assignment drawn out, and then A. obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or to pay the full price; because B.'s undertenant had removed some of the fixtures. It was held that B. might insist on his accepting an assignment, and on demand and refusal might maintain trover for the lease.

The following case, although not the case of an agreement for the sale of a legal interest, deserves notice here. It arose upon an agreement for the sale of the interest of a plaintiff, under an agreement for a lease. (*p*) In the year 1796, an agreement was entered into between the agents of the Duke of Bedford and one Scrimshaw, for the grant to the latter of a piece of ground intended to form the south-west side of Tavistock-square, on a building lease, the term 99 years, at a pepper-corn rent for the three first years, and 42*l.* for the remainder of the time. A

(*l*) *Elliott v. Edwards*, 3 B. and P. P. C. 277.

181.

(*o*) *Parry v. Frame*, 3 B. and P. 487.

(*m*) *Stevens v. Adamson*, 2 Stark. N. P. C. 422.

(*p*) *Baxter v. Conolly*, 1 Jac. and W. 576.

(*n*) *Adams v. Fairbairn*, 2 Stark. N.

proposal for the lease, specifying the terms and the building conditions, was inscribed in a book kept by the duke's agents at their office; and the following memorandum was signed by Scrimshaw at the foot of it,—“27th July 1796, the above proposal agreed to this day by me. Henry Scrimshaw.” In May 1800, Scrimshaw agreed to assign his interest in the premises to the defendant, who in 1805, no buildings having been commenced, agreed to sell it to the plaintiff; and on that occasion the following memorandum of agreement was drawn up and signed by the plaintiff. “Memorandum: I the underwritten Samuel Baxter do hereby agree with Charles Conolly, Esq. in consideration of his giving up to me all his right and interest of and in 140 feet of ground fronting Tavistock-square, by a depth of 80 feet, forming the corner of the said square, and of an intended street to be called New Frances-street, which ground was originally taken by Mr. Henry Scrimshaw of the duke of Bedford, at the yearly rent of 42*l.*, under conditions for building thereon, &c. since vested in the said Charles Conolly, to fulfil, perform, and keep the terms and conditions mentioned in the memorandum kept at the duke of Bedford's office for that purpose, &c. and also to well and effectually secure to the said Charles Conolly, his executors, administrators, and assigns, for the whole building term in the said ground, an improved yearly ground rent of 40*l.*, over and above the said original ground rent of 42*l.* payable to the duke of Bedford, with such covenants and conditions for securing the same clear of all deductions, as are contained in the lease of the duke of Bedford. The said ground rent amounting to 82*l.* to commence from Midsummer 1806, the said Samuel Baxter observing the conditions aforesaid, May 18, 1805.” Under this agreement the plaintiff paid to the defendant according to the terms of the agreement 40*l.* *per annum*, from 1805 to 1816: but he did not begin building; nor did it appear that he had ever taken possession, or at least made any use of the land. Some arrears of the annual payment being due, the defendant in Easter term 1819, brought an action of assumpsit on the special agreement; and there was also a count for use and occupation against the plaintiff for the recovery of them. At the trial Abbott C. J. was of opinion that the fact of the plaintiff's having made the previous payments was conclusive evidence of his having taken possession of the land; and the jury under his direction found a

verdict for the defendant in equity, (the plaintiff at law). A writ of error, which was still pending, had been brought on the judgment entered upon this verdict. The bill filed after the verdict charged that the defendant was not able to make any title to the premises, and that being surrounded by lands belonging to other proprietors over which there was no right of way they were inaccessible, and prayed that the contract might be delivered up to be cancelled,—the money that had been paid by the plaintiff to the defendant refunded,—and an injunction to restrain the defendant from proceeding upon the verdict, or otherwise for recovery of the 40*l.* *per annum*. The defendant in his answer said, that at the time of the agreement the plaintiff was well aware of the nature of his interest in the premises; and insisted that he was not entitled according to the true meaning of the contract to any evidence of title, or to any title except the agreement signed by Scrimshaw, and that by which Scrimshaw assigned to him, or that if originally he had a right to call for a title, he had since waived it.

On a motion for an injunction, the lord chancellor said, “whether the defendant can succeed in the action which he has brought has nothing to do with the agreement. The question before me is, whether I ought to permit him to bring an action for the recovery of the 40*l.*? I state this as a case in which I have not a particle of doubt. The meaning of this contract is no more than this: if you (the defendant) will put me in the same situation as yourself with the landlord, whether it be a contract for an interest or goodwill, I will undertake not only for the rent, but to pay you an annuity of 40*l.* a year. This is in 1805. It may be there is no road: but the landlord may say, if this house is to be built in this corner it is part of the square; and what accommodation they may have it is for them to enquire before they enter into the agreement. From 1805 to 1816 payment is made under this agreement. Was it ever heard, after ten years, that it could be argued that the parties who had signed the agreement, and acted upon it for that time, can pretend to say that they did not understand what they were about? It is said the duke of Bedford (the landlord) is not bound to grant a lease. I cannot say whether he is or not: if the terms and conditions had been performed, he would have been bound. But supposing he is not bound, and the court certainly will not execute a con-

tract for the sale of a good will; at the same time it will not enjoin against any proceeding at law under such an agreement. Suppose, for instance, there is a contract for the good will of a shop; it cannot be conveyed, and the court would say, Go and make what you can of it at law. If you can recover very well, we won't prevent you; if you cannot, very well again, we won't assist you. The question here is, taking this as a contract for an equitable interest, or for the benefit of the honour of the duke of Bedford, provided the party has done what he engaged to do, what right have I to restrain the defendant at law? If he has mistaken his action, you have your defence at law:—but what equity has the plaintiff to come here at this distance of time? This is not a case in which a positive title is agreed for; but it is conditional: you are to perform certain things before a title can be asked for. I am therefore of opinion that there is not a particle of equity in this application." From Lord Eldon's judgment in this case, although he appears to rest in some measure upon the delay of the plaintiff, it does not appear that the general principle laid down by him was any thing more or less than that in cases of the agreement to assign a good will, the court would not interfere either on the one side or the other; *i. e.* either to enforce the contract, or to restrain proceedings at law.

The purchaser of a leasehold interest must in equity be held to have contracted with full notice of the clauses of the lease, at the time of the sale, because he might have looked into the lease before he entered into the contract. Therefore where (q) on a sale in lots of certain premises, the particulars of which stated them to be held under one lease reserving rent, and that the purchaser of one particular lot was to be exclusively subject to the rent; it was held that the other purchasers could not object to the title on the ground of a clause of re-entry on non-payment contained in the lease.

After judgment against the purchaser of a leasehold house and furniture, in an action at law for breach of contract, the vendor has a lien upon the house and furniture; and, in case of bankruptcy, may prove under the commission for any deficiency. (r)

(q) *Walter v. Maunde*, 1 Jac. and W. 181.

(r) *Ex parte Lord Seaforth*, 19 Ves. 235. 1 Rose B. C. 306.

Voluntary assignments in the lessee's lifetime must be by writing; and it has been determined that, although less than three years of the term remain unexpired, the assignment does not come within the exception of the second section of the statute of frauds. (s) Whether the assignment of a parol lease should be assigned by writing seems to be a question, although it has been ruled so at *nisi prius*. (t) An equitable assignment indeed may be made by depositing the indenture of lease with a creditor: but this gives no legal title; although it has been held that a bill in equity may be maintained against such a creditor for the specific performance of a covenant running with land. (u) The lord chancellor said, it was not material whether the creditor took it as a pledge, or as a purchase: he cannot take the estate, and refuse the burthen. If he is entitled to the legal conveyance, equity will consider him as actually having it as against the landlord. Under particular circumstances also the want of a formal conveyance has not been attended with disadvantage at law. Where (x) for instance a defendant, supposing himself the representative of a lessee for years, sold the term, and delivered the lease to the plaintiff, but without any written assignment or formal conveyance, saying the premises were his, and if any thing happened he would see the plaintiff righted; it was held that the plaintiff might maintain an action for money had and received against the defendant on the rightful administrator ousting the plaintiff by ejectment. The court said they did not wish to disturb the rule of *caveat emptor* in those cases where a regular conveyance had been made to which other covenants could not be added; because a seller only covenants for his own acts, and the acts of those claiming under him: but here the whole passed by parol, and proceeded on a misapprehension of both the parties that the defendant was the legal representative of the lessee. A parol agreement to deposit a lease when granted, as security for money, is not an equitable mortgage. (y)

Where (x) the defendant being possessed of certain stables in

(s) Anon. 1 Ventr. 382.

(x) Cripps v. Reade, 6 T. R. 606.

(t) Botting v. Martin, 1 Campb. N.P.C. 317.

(y) *Ex parte* Coombe, 4 Madd. 249.

(u) Lucas v. Comerford, 1 Ves. J. 109.

(z) Price v. Leyburn, 1 Gow. N.P.C.

which he carried on business as a coachmaster, and also of divers horses, carriages, and other chattels on the premises, in consideration that the plaintiff would take possession of the said stables, and become tenant of the same, and buy the horses at 410*l.*, by parol undertook to pay the plaintiff any money which he might be compelled to pay for arrears of taxes or rent, this was held not to be an agreement within the third section of the statute of frauds for the passing an interest in land. So where (a) a tenant having agreed by parol with his landlady, that if she would accept another for her tenant in his place (he being restrained from assigning without licence) he would give her 40*l.* out of 100*l.*, which he was to receive for the good will if her consent were obtained; he having received the 100*l.* from the tenant who was cognisant of the agreement, it was held that the landlady might recover in an action for money had and received, because the consideration being executed, it was out of the statute of frauds as a contract for an interest in land.

No particular form is requisite in an assignment. The only directions of the statute are, that it shall be by deed or note in writing, and signed by the party making it: it has been held, therefore, that it may be by any note in writing not purporting to be a deed, and requires no sealing or delivery. (b) If, however, it is the assignment of a reversion after an underlease, there clearly the grant must be by deed, as in all other cases of the grant of a reversion. (c)

The word "assign" in an assignment is said to be as general a word of covenant as "demise" in a lease. (d) Nor is it more extensive in effect; for if tenant for life leases for years, and the lessee assigns all his estate *tam amplo modo et forma*, as he ought to have it, this implies no warranty beyond the life of the tenant for life. (e)

The proper mode for a joint tenant to convey his estate to his companion is by release: but if he grant or assign it, it is well enough. (f) So where A. and B., a feme sole, were joint tenants,

(a) *Griffith v. Young*, 12 East. 513.(d) *Bac. Abr. Cov. B.* pl. 65.(b) *Beck d. Fry v. Phillips*, 5 Burr.(e) *Landydale v. Cheyney*, Cro. Eliz.2837. *Arnold v. Bidgood*, Cro. Jac. 157.

318.

(f) *Chester v. Willan*, 2 Saund. 96.(c) *Beely v. Parry*, 3 Lev. 155.

and B. took baron, and then she and her baron levied a fine *sur concesserunt* of the term to A., this was held to be a good release of her share, and extinguished the jointure. (g) If one of two joint-tenants assign any part of the premises to a stranger, the joint-tenancy in the whole is severed. (h)

In assignments an exception of timber trees, or of the gravel and clay within the land, is void, because the lessee cannot except that which does not belong to him. On the same principle, where the lessee having committed waste by the opening of a mine assigned over, excepting the profits of a mine, this was a void exception. (i)

Although there can be no implied trust between lessor and lessee, there may be such an implication between assignor and assignee as well as in the sale of any other species of property. (k)

An assignment, as has been beforementioned, implies the transfer of the whole interest of the lessee: therefore, the reservation of a single day will make it an underlease, and not an assignment. So where lessees for lives granted all their estate, right, title, and interest for ninety-nine years, if the *cestuis que vils* should so long live, this was no assignment of the freehold; and, consequently, not of the whole interest of the grantors; and no privity was transferred as between lessor and lessee. (l)

In the earlier cases it was doubted whether rent could be reserved on assignments of terms: but it seems to be settled that it may be so reserved without deed; and such reservations are, strictly speaking, rents, though the lessor have no reversion. (m) So where the grant is made to him in reversion of the whole term, which is not actually but consequentially only a surrender by operation of law, a rent or condition may be reserved without deed: but it was said that if it were the case of a freehold, a deed would be requisite in respect of the freehold as well for the reservation of rent as of a condition. (n)

(g) *Eustace v. Scayen*, 2 Roll. Rep. 444.

(h) *Sym's case*, Cro. Eliz. 33.

(i) *Saunders's case*, 5 Rep. 12. a.

(k) *Hutchins v. Lee*, 1 Atk. 447.

(l) *Lord Derby v. Taylor*, 1 East. 502.

(m) *Spatchurst v. Minns*, Aleyne 58. *Floyd v. Langfield*, 1 Freem. 218.

Winston v. Pinckney, 1 Ventr. 242. 272. *Newcomb v. Harvey*, Carth. 161.

(n) Per Lord Hale, 1 Ventr. 242.

Where (o) on an assignment it was declared that the second assignee should have the premises on the terms of the lease, and should pay the sum of 8*l.* 10*s.* over and above the rent annually, towards the good will already paid by the assignee: this sum was held to be in gross, although reserved annually, and only intended to reimburse the assignee by annual payments the sum in gross which he himself had paid towards the good will of the house demised. Mr. Justice Buller observed that, as it was not expressed on the face of the instrument from what time the payment of the 8*l.* 10*s.* was to commence, it should be taken to mean from the time of the agreement: supposing it, therefore, made in the middle of a quarter, it could not apply to rent, because it was to be paid for the good will from the time of the agreement.

Upon the same principle that rent may be reserved, conditions of re-entry for the nonpayment of rent, and all other covenants, conditions, and provisos which make usually part of the contract in leases, may be inserted in assignments. (p)

Where a lessee *pur autre vie* to him, his heirs and assigns, assigned his whole interest, reserving rent to him and his executors, with a proviso that upon nonpayment the assignor and his heirs might re-enter, and the assignee covenanted to pay rent to the assignor, his executors and administrators; it was held to be a good reservation to the executor; and, that in case the heir should enter by force of the proviso, he would be a trustee for the executor. (q)

Assignments being in the nature of sales, the same covenants for title, further assurance, and quiet enjoyment, are introduced into assignments as into conveyances of the fee-simple; and it is frequently a question how far these covenants are dependent on one another, and what are their respective offices. (r)

Covenants for title may either include the title of the lessor, or may be confined (as they usually are) to the acts of the assignor and those claiming under him. In *Barton v. Fitzgerald*, (s) the deed of assignment, after reciting the original lease as granted to another for ten years absolutely, which term by mesne assignments

(o) *Smith v. Mapleback*, 1 T. R. P. Wms. 555.

441.

(r) *Crayford v. Crayford*, Cro. Car.

(p) *Doe d. Freeman v. Bateman*, 2 B. & A. 169.

106. *Nervins v. Munns*, 3 Lev. 46.

(s) 15 East. 530.

(q) *Jennison v. Lord Lexington*, 1

vested in the assignor; and also reciting that the plaintiff had contracted for the absolute purchase of the premises, witnessed that the defendant "bargained, sold, assigned, transferred, and set over," the same premises to the plaintiff for all the rest and residue of the said term of ten years in as ample a manner as the assignor might have held the same, subject to the payment of rent and the performance of covenants; and the assignor then covenanted that it was a good and subsisting lease valid in law in and for the said premises thereby assigned; and not forfeited, or otherwise determined or become void or voidable: it was held that the generality of this covenant for title, supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide against the acts of the assignor, and those claiming under him. Therefore, as it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, and after the assignment: it was held that the assignee might, in an action of covenant against the assignor, assign a breach upon an absolute covenant for title. In an early case, (1) however, where the lessee of a tenant in tail, whose lease was not warranted by the statute 32 Hen. VIII., on assignment covenanted that he was possessed of the indenture, and that at the time of the assignment it was unavowed and unavoidable, and then the tenant in tail died; and the breach assigned was, that the issue entered: the court held that this was no breach; *secus* if the covenant had been that the lease should continue unavowed during the term, or that the assignee should enjoy during the term.

In the case of *Barton v. Fitzgerald*, abovementioned, Lord Ellenborough observed that the covenant for enjoyment was not unnecessary, although the covenant for title should be held to be absolute; for this related to the title, whereas the covenant for quiet enjoyment related only to the acts of the assignor subsequent to the vesting of the title. In the case of *Howell v. Richards* (2) the court made a similar distinction between covenants for title and those for quiet enjoyment; and it was held that the generality of the covenants for quiet enjoyment was not restrained by the qualified nature of the covenants for title and a right to con-

(1) *Hemingway v. Sad*, 3 Keb. 816,

(2) 11 East. 633.

vey. "The covenant for title and a right to convey were sometimes, though improperly, called 'synonymous covenants.' They were, however, connected covenants, and generally of the same import and effect; and, being directed to one and the same end, the qualifying language of the one might properly enough be considered as virtually applicable to the other: but the covenant for quiet enjoyment was of a materially different import, and directed to a different object. The covenant for title was an assurance to the purchaser that the vendor had the very estate in quantity and quality which he purported to convey; the covenant for quiet enjoyment was an assurance against the consequences of a defective title and any disturbance thereon. For the purpose of this covenant, and any indemnity it afforded, it was immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee took place: if he should be lawfully evicted, the grantor by such his covenant stipulated to indemnify him at all events. And it was perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited way for the particular description of title which he purported to convey than for quiet enjoyment. He might suspect, and even know, that his title in strictness of law was in some degree imperfect: but he might at the same time know that it had not become so by any act of his own. And he might likewise know that the imperfection was not of such a nature as to afford any reasonable chance of disturbance to those who should take under it. He might, therefore, very readily take upon himself a liability to make an indemnity against an event which he considered next to impossible, whilst he chose to avoid the responsibility for the strict legal perfection of his title in case it should be found at any future time to have been liable to an exception at the time of his conveyance."

In *Nind v. Marshall* (v) there was a covenant for quiet enjoyment during the term, "without the lawful let, suit, interruption, &c. of J. M., his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having or claiming any estate or right on the premises; and that free and clear and freely and clearly discharged or otherwise by J. M., his heirs, executors, or administrators, defended, kept harmless, and indemnified from all

former gifts, grants, bargains, sales, leases, mortgages, assignments, rents and arrears of rent, statutes, judgments, and recognizances made and suffered by J. M., or by their or either of their acts, means, default, procurement, consent, or privity." And this covenant was preceded by a covenant that the lease was a good lease, notwithstanding any act by J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever, claiming during the residue of the term any estate in the premises under him or them: it was held (Park, J. dissent.), that the covenant for quiet enjoyment extended only against the acts of the covenantor, and those claiming under him, and not against the whole world. It was argued, in this case, that the words of this covenant, *viz.* "or any other person or persons whomsoever," must extend in necessary construction to all mankind having title, however derived; especially as those words were superadded to the express mention of the covenantor himself by name, his executors, administrators, and assigns. But Mr. J. Richardson observed that the covenant for quiet enjoyment did not end there; but went on to particularize the grounds of let or disturbance, from which the enjoyment covenanted for was to be free and clear; and all these would be found to be such as arose from acts done or defaults made by the covenantor himself. It was manifest, likewise, that the latter part of the covenant would be made wholly inoperative if the former were construed an absolute covenant for quiet enjoyment against all mankind, on whatever grounds they might be found to derive title. It might, however, be said that, by thus giving effect to the latter qualifying words, the absolute words relied on, namely, "or any person or persons whomsoever," would be rendered inoperative: but if these words were coupled, as they might well be, with the qualifying words superadded, they would not be wholly inoperative; for the former part of the covenant prior to the words in question engaged that there should be a quiet enjoyment without the interruption of the defendant himself, his executors, administrators, and assigns; and, if other words descriptive of a larger class of persons had not been added, it would have been at least doubtful whether a disturbance from an underlease, rent-charge, or annuity secured by a power of distress, or on a recognizance or judgment, would have been provided for. But all these dangers were effectually excluded by the construction of the court; and the cove-

nant in effect stood thus: that there should be quiet enjoyment during the residue of the term free from or indemnified against all interruptions not only on the part of the covenantor himself: but on the part of all other persons lawfully deriving title, or interest from the acts or defaults of the covenantor, his executors, administrators or assigns.

The assignor of a lease covenanted that he had not at any time done or suffered any act or thing whereby the premises intended to be assigned could be impeached or affected in title or estate, and that for and notwithstanding any such act, &c. the lease was a good, valid, and subsisting lease, and not forfeited, surrendered, or become void; and that he had in himself good right, full power and authority to grant, assign, transfer, and set over the same to the assignee in the manner aforesaid. Then followed a covenant for further assurance by the assignor and all persons claiming under him. Held that such covenant was confined to the act of the assignor alone. (x)

Where (y) a lessee by indenture, reciting that the lease had been made to himself and another as joint tenants, and averring the death of A. by which the interest survived to him, granted all his estate and interest to the defendant, and covenanted that the defendant should enjoy without disturbance for any act done by him; and it appeared that the other joint tenant had assigned his moiety in his lifetime: it was held that the express covenant did not in this case qualify the general warranty, and this was affirmed in error. The distinction appears to be between a grant which is good at first, and becomes bad by subsequent eviction, (in which case an express covenant will qualify the general warranty: (z)) and this case, where the grant never was good for a moiety, nor had the assignee ever enjoyed more; yet the assignor had granted the whole.—This was of the substance of the agreement, and was not qualified by the ensuing covenant.

If there is an agreement between the lessee and another that the other is to accept the lease, and take the fixtures and crop at a valuation, and the assignee take possession, but the lease is never assigned, the assignor cannot maintain *indebitatus assumpsit* for the

(x) Foord v. Wilson, 2 B. Moor.

(y) Johnson v. Proctor, Yelv. 175.

592.

(z) Nokes's case, 4 Rep. 30. b.

fixtures and crop : but his only remedy is by a special action on the agreement. (a) But where there was an agreement between the outgoing and incoming tenant that the latter should buy the hay and spike roll of the former on the farm ; and that the former should allow to the latter the expense of repairing gates and fences ; and the value of the hay and repairs should be settled by third persons : It was held that the balance might be recovered by the outgoing tenant in *indebitatus assumpsit* on a count for goods sold and delivered. Nothing being referred to the appraisers but the valuation of the goods and repairs, an appraisement stamp on the written valuation was held sufficient. (b)

The executor of a tenant from year to year may gain a settlement by residing on a tenement under 10*l.* a year, and that before probate although his testator could not : and the distinction arises from the difference of character. The one comes in by his own contract, and the other by act of law ; and, consequently, cannot be considered as coming into the parish with the views provided against by the stats. 13 and 14 Ch. II. c. 12. This case, therefore, is not considered within the purview of that statute. (c) In the case of a purchase, if the value be below 30*l.*, no settlement can be gained : but if the property comes by act of law, the value is not material. An equitable interest with continued possession is sufficient. (d) And a sole next of kin has such an equitable interest in a leasehold tenement of an intestate that he may gain a settlement by residing the requisite time in the same parish after the intestate's death before administration granted to him ; neither was it considered material that the intestate's widow survived him, as she died without taking out administration leaving the other sole next of kin. For it is so much a claim of right in the next of kin to take out administration, that if the ordinary refused, the court would grant a mandamus to enforce it. (e) A man cannot be removed from his own leasehold estate, although below the value of 10*l.* a year, though actually chargeable :

(a) *Neal v. Viney*, 1 Campb. N. P. C. Grandborough, 1 Str. 97.

471.

(d) *R. v. Edington*, 1 East. 288.

(b) *Leeds v. Burrows*, 12 East. 1.

(e) *R. v. Horsley*, 8 East. 405. See

(c) *R. v. Stone*, 6 T. R. 297. See

R. v. Coldashton, Burr. Settl. Cas.

R. v. Uttoxeter, Burr. S. C. 538.

450. *R. v. Northcarry*, Cald. 137.

R. v. Sundrish, ib. 7. *Muraley v.*

because the stat. 13 and 14 Ch. II. c. 14. has been never held to apply to persons living on their own estates, of whatever nature or value it may be. (*f*)

The residence in all settlement cases must be in the character of tenant: If, therefore, a tenant be arrested and taken out of the parish, the occupation by his wife and children will gain no settlement for either husband or wife. (*g*) So a residence of thirty-three days by a widow cannot be coupled with a residence of sixteen days on the same tenement with her husband preceding his death; (*h*) but in the case of assignments the authority of the landlord is not requisite. (*i*)

The same observations as have been made on the execution of leases, where made by deed, will apply to assignments where made by deed: and it has been determined that if the vendor of a leasehold estate delivers the conveyance as an escrow, to take effect on the payment of the residue of the purchase money, the property in the title deeds is so vested in the vendee, that if the vendor retaining possession of them pawn them, he confers on the pawnee no right to detain them after the payment of the residue of the purchase money. (*k*) If a decree for a sale of lands be made in the Chancery or Exchequer in Ireland, and the proper party refuses to execute the conveyance, the stat. 28 Geo. III. c. 35. Ir. enables a master in chancery, or remembrancer in the Exchequer, to execute it in the name of such person refusing.

So also the nature of covenants as distinguished into collateral covenants and those running with the land is the same in the assignments as in leases. Therefore, where A. assigned to B. part of the premises for the residue of a term, with a covenant for quiet enjoyment; and B. assigned to C.: it was held that C. might bring an action of covenant against A. on this covenant if evicted, because it ran with the land; and a sufficient privity is transferred through the intermediate assignee. (*l*)

The second section of the statute 53 Geo. III. c. 141. requires

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| (<i>f</i>) <i>R. v. Martley</i> , 5 East. 40. | (<i>h</i>) <i>R. v. South Lynn</i> , 5 T. R. 664. |
| <i>R. v. Sandridge</i> , 2 Str. 983. R. | (<i>i</i>) <i>R. v. Aldborough</i> , 1 East, 597. |
| <i>v. Dunchurch</i> , Burr. S. C. 553. | (<i>k</i>) <i>Hooper v. Ramsbottom</i> , 6 |
| <i>R. v. Houghton le Spring</i> , 1 East. | Taunt. 12. |
| 247. | (<i>l</i>) <i>Campbell v. Lewis</i> , 3 B. and A. |
| (<i>g</i>) <i>R. v. St. George the Martyr</i> , | 392. <i>Middlemore v. Goodale</i> , Cro. |
| <i>Southwark</i> , 7 T. R. 466. R. <i>v. St.</i> | Car. 503. 505. |
| <i>Mary, Lambeth</i> , 8 T. R. 240. | |

every memorial of an annuity enrolled in pursuance of the act to specify among other things "the pecuniary consideration or considerations for granting the same;" and the tenth section declares that the act shall not extend, amongst other things, "to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth." And from these words it has been argued that the act applies to all cases where any thing valuable is given for the purchase of an annuity: but in a recent case (*m*) the court held that considering these two sections together, and the intent of the legislature, as it is to be collected therefrom, the act did not extend to cases of fair and *bond fide* sales of landed property, whether freehold for life, or leasehold for years, where the consideration in part or in whole might be an annuity to be paid to the vendor. "Money's worth," within the meaning of the act, they thought, was intended to refer to goods or merchandize, with a nominal, or perhaps a real value imposed upon them to be converted into money by the grantor; and where the object of the grantor was to raise money.

Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first, the deed last registered was held fraudulent and void in a court of law in consequence of the statute 7 Ann. c. 20. s. 1., although the party claiming under the second assignment had full notice of the execution of the prior assignment. (*n*) It seems, however, that in a court of equity the party claiming under the first deed might have been relieved. It was so laid down by Lord Hardwicke, in *Le Neve v. Le Neve*; (*o*) and in *Doe v. Routledge* (*p*) Lord Mansfield puts it as a case in which equity would interfere, because the party had the notice which the act of parliament intended he should have.

Nothing beyond the bare execution of the deed is necessary on the part of the grantor to pass his interest: but it does not seem to have been yet determined what, in all cases, shall be considered sufficient to perfect the assignment on the part of the assignee. In the case of *Copeland v. Stephens*, (*q*) the inclination of the

(*m*) *James v. James*, 2 Brod. and B. 702.

(*n*) *Doe d. Robinson v. Allaop*, 5 B. and A. 142.

(*o*) 3 Atk. 646.

(*p*) Cowp. 712.

(*q*) 1 B. and A. 594.

court seemed to be that possession was in no case necessary to the perfection of an assignment.

Where (r) a trustee, to whom two leases were assigned in trust to secure an annuity, said to the occupier of one of the houses, "You must pay the rent to me; I am become landlord for my client, who has an annuity, and you must pay the ground-rent to me:" it was held that the trustee was liable as assignee both for rent and repairs, because he had done that which approached as nearly as possible to an entry under the circumstances.

Where (s) a party takes the assignment of a lease by way of mortgage as security for money lent, the whole interest passes to him; and he becomes liable as assignee, although he never occupies, or becomes possessed in fact. A court of equity, however, will not compel a mortgagee to discover his assignment, in order to make him liable to the obligations of the contract; but will leave the landlord to recover at law as well as he can. (t)

So it has been determined (u) that the mortgagee of a term may assign the term without being in actual possession, for the mortgagor is a kind of tenant at will to the mortgagee; and, although the assignment would determine such a tenancy, yet the mortgagor's continuing in possession after such an assignment is no disseisin, but he becomes *quasi* tenant at sufferance to the assignee. With respect, however, to conusees of statutes, or where the term is taken in execution under a judgment, the assignment of the term without actual possession at the time of the assignment is void, because these assignments operate *in invitum*. In a case, (x) therefore, where the conusee of a statute extended the term, and a *liberate* was returned executed, but the conusee never entered, his assignment during the possession of the tenant was held void, because the continuance of the possession of the conusor amounted to an ouster.

Since the assignee is only liable in respect of the privity of estate, if he parts with his interest by assignment to another, he is no longer liable, (y) because the privity of estate is determined

(r) *Gretton v. Diggle, & Taunt.*
766.

(s) *Williams v. Bosanquet*, 1 Brod.
and Bingham 338. *Trahorne v. Sadleir*,
5 Bro. P. C. 179. Toml. Ed.

(t) *Sparkes v. Smith*, 2 Vern. 275.

(u) *Smartle v. Williams*, 3 Lev. 388.

(x) *Hannam v. Woodford*, Cas. temp.
Holt. 263.

(y) *Pitcher v. Tovey*, Carth. 177.

by his assignment over. And this not only renders him free from liability for rent accruing and breaches of covenant subsequent to his assignment: but there seems to be no legal mode of making him responsible for rent due and breaches of covenant during the time he enjoyed the profits. (x) The assignment too may be made without notice to the lessor or the assignee of the reversion. (a) If the lessee or the assignee remain in possession after an assignment, he has but a naked possession, and no estate or interest; and the grantee may assign over notwithstanding. (b) If, however, it is a collusive assignment, in order to defraud the landlord, by rendering it impossible for him to know the actual tenant, it seems that, in debt or covenant for the rent, the landlord may aver fraud. (c) It is, however, settled that there is no fraud in the assignee of a lease assigning over to whom he pleases, with a view of getting rid of the term; (d) for the original contract always remains the same between the original parties: and, with respect to covenants running with land, the assignee of the reversion is not without adequate remedy against the original lessee or his representatives, who must be intended to be responsible persons. The assignee may, therefore, assign to a bankrupt or an insolvent; (e) and in one case (f) where the assignee, after having offered to surrender the lease, gave a premium to an insolvent to take it, it was considered no fraud. So the assignment may be made to a person leaving the kingdom provided the assignment is executed before his departure. (g) An assignment to a feme covert is clearly good subject to her husband's approbation: but if he do not dissent, he becomes responsible, and not the wife. (h) In *Philpot v. Hoare* (i) the assignment was fraudulent, the assignee having assigned the premises to an agent of her own, and received part of the profits. Lord Hardwicke decreed not only that the defendant should answer the rent; but that the fraudulent assignment should be set aside.

(x) 2 Madd. Ch. Ca. 342.

(a) *Keighley v. Bulkeley*, 1 Lev. 215. *Cook v. Harris*, 1 Lord Raym. 367.(b) *Ayer v. Joyner*, Ow. 141. *Walker v. Reeves*, Dougl. 461. n. 1.(c) *Knight v. Freeman*, 1 Vent. 329, 331.(d) *Taylor v. Shum*, 1 Bos. and Pull. 21.(e) *Lekeux v. Nath*, 2 Str. 1221.(f) *Valiant v. Dodomede*, 2 Atk. 546.(g) *Taylor v. Shum*, *supra*.(h) *Barnfather v. Jordan*, Dougl. 452.

(i) 2 Atk. 219.

If the lessor was a party to the deed of assignment, and any new consideration passes from him, such, for example, as making a term, which was determinable at his option, absolute; the contract as against the assignee should be stated as a demise, if he in the mean time has assigned over: for if he is charged as assignee for rent accrued after the assignment over, the law will excuse him in this case as much as in any other. (k)

Where (1) A. being the assignee of a lease, sold it by auction to B., and B. paid a deposit, and ordered a deed of assignment to be prepared, which was executed by A., but not delivered to B. because the solicitor retained it for his expenses, this was held to be a sufficient assignment to release the privity of estate of A. as assignee.

In consequence of the state of the law on this point, it is usual and necessary in all deeds of assignment by the act of the party to introduce covenants of indemnity from the assignee, for the payment of rent and performance of covenants: and even when (*m*) the assignor, who was the personal representative of the lessee, could not enter into a covenant for title, Lord Eldon thought that, on general principles, a covenant of indemnity could not be omitted in a specific performance of a contract for the assignment of a lease. But where (*n*) a bankrupt before his bankruptcy assigned the whole term in mortgage, his assignees under the commission taking only the equity of redemption by act of law, and not being thereby liable to the covenants of the lease, could require no indemnity from the assignee or purchaser of such equity of redemption.

A covenant, as well as a bond, of indemnity, is merely collateral to, and does not run with the land: neither will the stat. 5 Geo. II. c. 30. s. 7., which releases bankrupts, in cases where the cause of action accrued before the bankruptcy, discharge the assignee from it, if the covenant be broke after he becomes bankrupt; for the lessee can have no remedy under the commission, because there was no debt at the time of the bankruptcy; (o) and the stat.

(k) *Chancellor v. Poole*, Dougl. 764; Beames, 10.
(l) *Odell v. Wake*, 3 Campb. N.P.C. 394; (n) *Wilkins v. Fry*, 1 Meriv. Ch. Ca. 264. *Pember v. Mathers*, 1 Bro. Ch. Ca. 52.

(m) *Staines v. Morris*, 1 Ves. and . . . (o) *Mayor v. Steward*, 4 Burr. 242.

49 Geo. III. c. 121. is equally inapplicable, since it was intended only for cases arising between lessor and lessee. (*p*) Covenants of indemnity, however, extend only to lawful acts; and, therefore, where the lessor tortiously distrained the goods of the first lessee upon the premises, it was held that no action would lie. (*q*)

We have seen that equity gives relief to a landlord for his rent in cases of assignment, where the assignment was merely colourable and fictitious, the possession remaining with the assignor: equity will also give relief where, although the assignment be real; yet it has been made with the intent to deprive the landlord of his legal remedy for rent due and breaches of covenant previous to the assignment; for although in strictness of law there is no privity of estate, yet in equity he is chargeable as long as he received the profits. (*r*) On the same principle every *cestui que trust* in possession is liable in equity as long as he enjoys the possession. (*s*)

The assignees of a bankrupt may, like all other assignees after election to take the lease, exonerate themselves from all future claims, by assigning the lease even to an insolvent person. It has, indeed, been argued (*t*) that since, by the provisions of the late act, (*u*) their voluntary acceptance of the lease exonerated the bankrupt from all claims of his landlord, they were bound, if they assigned it, to take care to assign it to a *bona fide* responsible person. It appeared that in the case cited, prior to the acceptance of the lease by the assignees, the assignees and the bankrupt offered to surrender the lease; and afterwards, the assignees having unguardedly accepted the lease, they assigned it to an insolvent person: The vice-chancellor said, that before the stat. 49 Geo. III. c. 121. the assignees might have assigned to a beggar. It was now contended that they could not assign but to a *bona fide* responsible assignee. It was difficult to say who would answer that description, and in what way the character and responsibility of

(*p*) Taylor v. Young, 3 B. and A. Eq. 361. Richmond v. The City of London, 1 Bro. P. C. 516.
 521. Young v. Taylor, 8 Taunt. 315.
 2 B. Moor. 326. (*q*) 3 P. Wms. 402.
 (*q*) Cowper v. Jones, W. Jones, 197. (*t*) Onslow v. Corrie, 2 Madd. Ch. Cas. 330.
 (*r*) Treacle v. Coke, 1 Vern. 165. (*u*) Stat. 49 Geo. III. c. 121.
 MS. case, cited 2 Madd. Ch. Ca. 342.
 Gilb. Lex. Præst. 362. 1 Fonbl. Tr.

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an assignee could be estimated. The act was silent on this point and must be taken to have left the law as it was before as to the right of assigning.

If a lease is a mere lease by estoppel, without having any effect in interest or possession, the assignment of such a lease has none of the incidents of *bona fide* leases; for there is no privity of estate, and the estoppel cannot be transferred by assignment. (v)

No act of the lessee can make any alteration in the relation between him and the landlord without his assent: if, therefore, the lessee assign over his whole interest in the whole or part of the land demised, he remains liable, notwithstanding, for the payment of rent, till the landlord accepts the assignee as his tenant. After the landlord has accepted the assignee as his tenant, no action of debt will lie against the lessee for rent due after the assignment, although the obligation of express covenants is still in force, and will continue during the lease by force of the privity of contract. (x) If the lessee assigns a part only, and the landlord accepts the assignee as his tenant, the rent will be apportioned; (y) but the lessor may bring a joint-action against the lessee and the assignee of part for the entire rent; for the act of the lessee cannot divide the action of the lessor. (z) So if two joint-tenants or tenants in common, lessees, make partition, the lessor may nevertheless sue both in one action. (a)

The suspense, which of late years has attended the performance of contracts of sale, has also occasioned, in a late instance, a case of considerable hardship, which seems referrible to this part of the subject. (b) The defendant, under a written agreement only, took the premises from the then owner for seventeen years, of which fourteen had expired when the plaintiffs contracted to sell the fee. There being some difficulty in making out the title, the purchase was delayed: in the mean time the purchaser contracted with the defendant for the possession; and the defendant permitted the purchaser to put in another tenant, who continued in possession for two years. The contract of sale was afterwards re-

(v) *Awder v. Nokes*, Moor. 419.
Taylor v. Needham, 2 Taunt. 283.

(x) *Thursby v. Plant*, 1 Saund. 240.

(y) Moor 93. *Gamon v. Vernon*,

3 Lev. 231.

(z) *The Bailiffs of Ipswich v. Martin*, Cro. Jac. 411.

(a) *Rysden's case*, cited Cro. Eliz. 637.

(b) *Mathews v. Sawell*, 8 Taunt. 270.

scinded, and the plaintiffs brought their action against the defendant for the rent of the last three years. In this case no surrender could be implied, nor was there any acknowledgment of the title of the lessors by the tenant or the purchaser. The court, at the same time that they acknowledged the hardship of the case, decided in favour of the plaintiffs. In this case it should be remarked that the defendant was only, according to the statement in the case, a tenant under an agreement: there was, therefore, properly no legal right except on the ground of his being tenant from year to year, upon the terms of the written agreement. There was certainly no termination of that tenancy by notice. Neither could there be any surrender; not because such surrender was by parol as stated in the case; but because the purchaser, who had a mere equitable interest, was incapable of accepting such a surrender, even if in other respects the transaction had been unexceptionable. Dallas, J. observed, If the plaintiffs had in fact consented that the defendant should in 1813, (the year of the contract) cease to be liable, and had gone beyond that, and had accepted a substituted tenant, I should have thought the defendant discharged. But the sale was with a reservation of the unexpired part of the term. Harvey (the purchaser) was let into possession under the defendant, and Allen (the new tenant) under Harvey. So far from the tenancy being determined in 1813, in 1814 the plaintiffs applied to the defendant for rent, and were referred by him to Allen; but plainly claiming rent to be due to them (from the defendant).

The last division of our subject is the assignment of estates *pur autre vie* and terms for years by will. Estates *pur autre vie* are deviseable by the statute of frauds with the same formalities which are required for the devise of freehold estates in fee simple; and if the tenant *pur autre vie* have mortgaged such an estate and die, being indebted to the same person by bond as he is by mortgage, it has been held that in equity the devisee is in no better situation than an heir, in those cases in which an heir would be bound, as having assets by descent. He, therefore, can be permitted to redeem only on condition of paying both the mortgage money and

the bond debt. (e) This rule, however, does not affect a devise for the payment of debts. (f)

Where (g) an estate *pur auter vie* limited to the lessee, his executors, administrators, and assigns, was devised by a will attested by two witnesses only, it was held by Lord Eldon, after much discussion, that the estate should go according to the will: for that, as between the next of kin and the residuary devisee, the executor is in equity a trustee for those to whom the testator has given the personal estate by a will sufficient to pass personal estate.

Where an estate *pur auter vie* is granted to a person, his heirs and assigns, or to him, his executors and administrators, the grantee may assign it over without reference to the original limitation, either to the assignee and his heirs, or the assignee and his executors; and the estate, after the death of the assignee, vests in the heir or executor, according as the one or the other is the person designated.

It has often occurred to me in practice, says Sir W. D. Evans, to meet with a case where the estate was demised to the lessee, his heirs and assigns; and the lessee had devised it in general terms, without mentioning executors or heirs; and, after the death of the assignee, it has been a question how it should go. I have seen opposite opinions on the subject by Lord Kenyon and Mr. Fearn: the latter in favour of the heir; the former in favour of the executor, which opinion was persisted in after a communication of the opposite sentiments of Mr. Fearn. And it is no doubt the true conclusion upon the subject: for, as there is no actual designation of the person of the heir, the ground on which he could claim, as special occupant, entirely fails; and the case, therefore, reverts to the general disposition of the statute of frauds, that where there is no special occupant, it shall go to the executor.

In a devise of such property, or in any kind of trust, by way of settlement, estates *pur auter vie* may be limited in strict settlement, and those in remainder may take as special occupants; for

(e) *Challis v. Casborne*, 1 Eq. Abr. 325. pl. 9. *Marwood v. Turner*, 3 P. Wms. 166. and 3 P. Wms. 264. n. D.

(f) *Hems v. Bance*, 3 Atk. 620. (g) *Ripley v. Waterworth*, 7 Ves. Westfaling v. Westfaling, 3 Atk. 460. 460.

such a devise is only a description of the person who shall take as special occupant. A limitation, however, in the nature of an estate tail, is not within the statute *de donis*: for all estates tail within that statute are estates of inheritance to which dower is incident. (*h*)

So where (*i*) a lease for three lives granted in the first instance to the lessee, his executors, administrators, and assigns, was assigned to a trustee, to the use of B. for life, and after her death to her issue, and for default of such issue remainder over; Lord Hardwicke held that the conveyance being of a chattel interest, the issue took the whole absolutely, as joint-tenants, and that nothing was intended to go over, but in case of failure of the issue: the words for want of such issue being construed to mean, "if there should be no such issue." This case has been followed by Lord Redesdale; where, (*k*) by articles referring to leases for lives and years, it was agreed that such leases should be conveyed to trustees in trust, after the successive lives of A. and B. to the issue of A. and D. his wife, and for default of such issue to the executor of A.: it was held that the word "issue" meant children, and that the children of A. and D. took an absolute interest in the leases for years, and a *quasi* fee in the freehold leases.

It seems now to be agreed that any alienation by a *quasi* tenant in tail of an estate *pur auter vie*, except by will, may bar the remainders over: although, if nothing is done, the remainderman will take as special occupant. (*l*) It may, therefore, be disposed of by deed. (*m*) So the *quasi* tenant in tail may bar the remainder over by surrendering the old lease, and taking a new lease to him, and his heirs: although there are prior existing trusts and charges unsatisfied. (*n*) According to the case of *Dillon v. Dillon*, (*o*) a *quasi* tenant in tail cannot bar remain-

(*h*) *Low v. Burron*, 3 P. Wms. 262.

See 1 Vez. 27. and *Chaplin v. Chaplin*, 3 P. Wms. 368. *Norton v. Frecker*, 1 Atk. 521. *Wasteneys v. Chapple*, 1 Bro. P. C. 457.

(*i*) *Williams v. Jekyll*, 2 Vez. 681.

(*k*) *Campbell v. Sandys*, 1 Scho. & Lefr. 281.

(*l*) *The Duke of Grafton v. Han-*

mer, 3 P. Wms. 266. n. E.

(*m*) 6 Ves. 158.

(*n*) *Blake v. Blake*, 1 Cox. 247. *Baker v. Bayley*, 2 Vern. 225. *Blake v. Luxton, Coop.* 178. *Baskett v. Peirce*, 1 Vern. 226. *Grey v. Manno*ck, 2 Ed. Rep. 339. cited 6 T. R. 292.

(*o*) 1 Ball and Beat. 95.

ders over by will. In an earlier case (*p*) Lord Redesdale gave his opinion on the point to the same effect, in contradiction to a *dictum* of Lord Kenyon's, in *Doe d. Blake v. Luxton*. (*q*) Lord Redesdale thought that the law should be governed by the principles which were applicable to fee simples conditional at the common law: the party had the power of alienating in his life time, and the effect of such alienation was to divest the estate under which the person claiming as heir of the body, or by virtue of the remainder over, could take. If that estate was divested, the right of the issue and the remainder man in default of issue was destroyed, because the estate on which it was to depend was also destroyed. But a will, so far as it was a disposition of the property, was a designation of a special heir against the right of the person to whom the property would otherwise come, by what might be called a devolution of law: but that could not, from the nature of the instrument, have the effect of depriving of a right a person who did not claim by devolution of law, but by virtue of a preceding gift or instrument. That must have been the ground on which it was established, that the will of a joint-tenant could not sever the jointure. A will is an instrument by which the maker is enabled only to bar his heir at law or personal representative, but which cannot be allowed to alter the rights of third persons.

Terms for years, like all other chattels, may be specifically bequeathed; and now by the stat. 11 Geo. I. c. 18. s. 17., a free-man of London may bequeath his personal estate in any way he pleases, notwithstanding the custom of London which formerly restrained him. (*r*)

A general disposition by will, of lands, tenements and hereditaments, or manors, messuages, lands, &c. is held only to extend to freehold property, and not to leasehold, unless the testator has no freehold property to answer to the description. (*s*) This rule, observes Sir W. D. Evans, which perhaps most frequently disappoints the actual intention of the testator, has been submitted to

(*p*) *Campbell v. Sandys*, *supra*.

(*q*) 6 T. R. 289.

(*r*) See *Smith v. Fellows*, 2 Atk. 377.

(*s*) *Rose v. Bartlett*, Cro. Car. 292.

Davis v. Gibbs, 3 P. Wms. 26. *Knatsford v. Gardiner*, 2 Atk. 450.

Pistol v. Riccardson, 1 H. Bl. 26. n.

But see *Addis v. Clement*, 3 P. Wms. 458.

with some degree of reluctance ; and distinctions have been made to comply with the supposed intent, or inferred from the circumstances of particular cases. (r) In a later case, (s) the testator having freehold and leasehold property let together as one farm, devised all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estate : the court of King's Bench considered the word " farms " as sufficient to take the case out of the rule, so as to pass leasehold. The efficacy of the rule was established in a subsequent case ; (t) where the devise was of the manor of W., and all other his manors, messuages, lands, tenements, and hereditaments, there being in it none of the circumstances relied upon in other cases. Lord Eldon (then C. J. of the Common Pleas) said, with reference to the intended certificate to the Court of Chancery, " The rule in *Rose v. Bartlett* is a rule which has been acknowledged for ages, and upon which I shall act until I am informed by the highest authority that I am not to regard it ;—till I shall be so informed, I shall substantially regard it in judgment : for I think it better to overrule it altogether, than to deny to it its effect upon grounds which do not completely satisfy my mind as safe and solid grounds of distinction."

A future as well as a present leasehold interest may pass by testament ; it not being necessary, as in the case of freehold, that the property should be vested in the testator at the time of the devise : but a general bequest of leasehold premises is held only to apply to such estates as are in existence at the time of making the will, and not to such as may be acquired by subsequent renewal, for the disposition of which, a particular intention must be shewn. (u)

Estates for years may be settled by will or otherwise, according to any modifications which suit the pleasure of the parties, provided the limitations are such that the absolute indefeasible estate must necessarily vest within the compass of any number of lives in being, and the term of twenty-one years after the death of the survivor ; with such additional period as may elapse between the death of the surviving life, and the birth of a posthu-

(r) *Addis v. Clement*, 2 P. Wms.

456. *Lowther v. Cavendish*, Amb.

356. *Turner v. Husler*, 1 Bro. Ch.

Ca. 78.

(s) *Lanc v. Stanhope*, 6 T. R. 345.

(t) *Thompson v. Lawley*, 2 B. & P.

303. 5 Ves. 476.

(u) *Abney v. Miller*, 2 Atk. 593.

Slatter v. Noton, 16 Ves. 197.

mous child having an interest in the subject. An opinion was expressed by the late Lord Alvanley, when master of the rolls, in the great case respecting Mr. Thelluson's will, that the term of twenty-one years, for which in this and other cases property may be rendered inalienable, is not a term absolute and independent of the situation of the person interested, but the attainment of a person entitled to the age of twenty-one years: on the principle that a child *en ventre sa mere* may be considered a life in being. (x) And this view of the subject seems to have been generally acquiesced in by the profession.

Where (y) there was a limitation of personal estate, in the event of the first taker dying under the age of twenty-five, to all his brothers and sisters who should arrive at the age of twenty-five, which would exceed the admitted limits, it was held to be void, not only as against those who might afterwards be born, but also as to those *in esse*, the disposition being entire, and intended to embrace persons not then born as well as those existing; it being settled that an executory devise (and the rule is equally applicable to any other mode of disposition,) exceeding the admitted limits is void *in toto*, and not merely for the excess.

If a term is bequeathed generally to any person, or to him and his assigns, the whole interest passes, and no words of limitation are requisite to make it transmissible to personal representatives. (z) If it be bequeathed to two equally, it will create a tenancy in common, because an equal benefit is intended to both. (a) It is nearly on the same principle that it seems to be settled, that there can be no such thing as the remainder of a term, in the usual sense of the word. All the old cases (b) establish the rule that a term is one entire thing; and, that if it is given away for an hour it is given away for ever. In every case, consequently, any limitation over can only take effect as an executory bequest, or the limitation of the trust of a term, which is governed by the same principles. (c)

(x) See *Thelluson v. Woodford*, 4 pl. 69.

Vca. 337. *Blandford v. Blandford*, (a) 3 Salk. 205.

Moor. 846. *Long v. Blackall*, 3 Vca. (b) *Green v. Edwards*, 1 Leon. 218.

486. *Fearne's Ex. Dev.* 495. Ed. 6th. Anon. 2 Leon. 200. Moor. 247. 296.

(y) *Leake v. Robinson*, 2 Meriv. 1 And. 258.

363. (c) *Amner v. Luddington*, And. 60.

(z) *Fenton v. Fortin*, Dy. 307. b. 3 Leon. 89. Plow. 519.

If a term, therefore, is bequeathed to A. for five years with remainder over to B., strictly speaking, the whole term is in A. during those five years, and the privity of estate between him and the reversioner is as perfect for the time as if the absolute interest had been granted to him : but the bequest over, whether vested or contingent, will take effect at the time appointed by the will ; and is transmissible to representatives, although the legatee in remainder should die before it takes effect in possession. (*d*)

So where (*e*) there was a bequest of a term to several successively for life, the court held clearly that all the remainders were good, and that each legatee for life had the whole term vested in him for his life, during which each remainderman had a possibility of remainder, and the executor had a possibility of reverter, which would come into possession, if all the legatees should die within the term. (*f*)

The first legatee has no power to bar the remainder over, although the remainder may be extinguished by release in the estate for life. (*g*)

The assignment of such a possibility during the life of the legatee for life is good in equity, if made to a stranger for valuable consideration. (*h*) And that it may be bequeathed was determined in *Wind v. Jekyll*, (*i*) So where a feme covert is entitled to such a possibility, it seems to be the better opinion that an assignment by the husband, even without consideration, will exclude her surviving; although, if such a possibility be considered as a chose in action, the doctrine is open to the objections which have been stated in a preceding page, as arising from the decision in the case of *Hornsby v. Lee*, (*k*) by the present master of the rolls. So also, it seems to be clear that the husband may release such a possibility; and the wife will be barred though it should not come *in esse* during the coverture, because it might possibly

(*d*) *Sheriff v. Wrotham*, Cro. Jac. 102. 2 Eq. Abr. 88. Domo. Proc. 509. *Kingslader v. Courtney*, 2 1729, 1730. See 1 P. Wms. 574, note Freem. 238. 250. S. P. *Walmstrey v. Tanfield*, 1 Ch.

(*e*) *Eyres v. Frankland*, 1 Salk. 231. Rep. 29.
Anon. 1 Freem. 272.

(*f*) *Dowse v. Earle*, 3 Lev. 264.

(*g*) *Lampet's case*, 10 Rep. 46.

(*h*) *Theobalds v. Duffoy*, 9 Mod.

(*i*) 1 P. Wms. 572.

(*k*) 2 Madd. Ch. Ca. 16. *Roper's Treat. on Husband and Wife, ante.*

come *in esse* during the coverture. (m) If the possibility can by no means come into *esse* during the coverture, as where a lease is limited to the wife if she survive the husband, he has no control over such a possibility either to release or dispose of it in any other way. (n)

Where (o) A. bequeathed a term to B. for life, remainder to the heirs of B., although it was held that this could not go to the heirs of B., yet, since there was an intention on the part of the testator to part with the whole term, it was determined that it should go to the executors of B. It was admitted at the same time, that by proper words the term might be limited to the heir of the body of B., so as to give the enjoyment of the rents and profits to B. for his life only. If a term be bequeathed to B. after the death of A., the bequest will give an estate for life to A. by implication. (p)

A bequest of a term to one for life, with a contingent remainder over, will in general only give the first taker an estate for life, and if the remainder do not take effect, the residue will go to the personal representative of the testator; yet, if it appear to be the intention of the testator to dispose of the whole term, the legatees claiming under the will may recover from the executors: therefore where (q) the bequest of a term was to the following effect, *viz.* after the death of A. to B. for life, with remainder to his child or children by any woman he should marry, his and their executors for ever, upon condition that in case the said B. should die an infant unmarried, and without issue, the premises should go over, and B. died without issue, although he arrived at full age and was married; it was held that the residuary legatees under the will, and not the executors, were entitled.

A term properly speaking cannot be entailed: for where it is given to one and the heirs of his body, it is settled that this is an absolute gift to the first taker. (r) He may dispose of it by

(m) *Gage v. Acton*, 1 Freem. 512.
515.

(n) 2 Roll. Abr. 48. Co. Litt. 46. b.

(o) *Davis v. Gibbs*, 3 P. Wms. 29.

(p) *Roe d. Bendale v. Summersett*,
5 Burr. 2608.

(q) *Doe d. Everett v. Cooke*, 7 East.
269.

(r) *Atkinson v. Hutchinson*, 3 P.
Wms. 258. *Brouncker v. Bagot*, 1
Meriv. Ch. Ca. 271. *Tothill v. Pitt*,
1 Madd. Ch. Ca. 488.

deed or will; and if he do not dispose of it, it will go upon his death to his personal representative. (s) A distinction was formerly made between such limitations as would give an estate tail in express terms, and such as only give an estate tail by implication: but the contrary is fully established, (t) namely, that in all cases the entire interest passes. But the courts have not shown themselves inclined to raise estates tail by implication in leasehold property. (u) The reason why the devise of freehold lands to one for life, and if he die without issue remainder over, has been determined to give an estate tail is, because the intention of the settlor was supposed to be in favour of the issue: but a bequest to one of a term of years, and if he die without issue then over, could never be so interpreted, because such words could never be supposed to have been inserted in favour of issue who could by no construction have it.

Where (v) the freehold and leasehold estates of the testator were limited by the same clause, Lord Macclesfield said it was reasonable enough to take the same words, as if the clause had been repeated in different senses, viz. the freehold to A. for life, and if he die without leaving issue then to B., and the leasehold to A., and if he die without issue (living at his death) then to B., so that both devises would be good; the one being an estate tail in A., and the other an interest for life with a contingent possibility to B. In a case, (x) however, where freehold and leasehold estates were devised to A. for life, remainder to B. and the heirs of his body, and if he had no such heirs then over, Lord Eldon thought that the words "and if he had no such heir" did not confine the bequest over to the limited time of executory devises, and therefore that B. had an estate tail in the freehold, and an absolute interest in the leasehold estate; although at the same time his lordship admitted, that where a leasehold estate is bequeathed to a person and the heirs of his body, with a limitation

(s) *Fearne's Ex. Dev.* 461. 6th edit.

(t) *Daw v. Pitt*, 6 Bro. P. C. 450.

Chandless v. Price, 3 Ves. 99.

(u) *Britton v. Twining*, 3 Meriv.

Ch. Ca. 176. *Forth v. Chapman*, 1 P.

Wms. 667. *Studholme v. Hodgson*,

3 P. Wms. 304.

(v) *Forth v. Chapman*, 1 P. Wms.

667.

(x) *Crook v. De Vandes*, 9 Ves. 197.

See *Goodtitle d. Peake v. Pegden*, 2

T.R. 720. and *Mogg v. Mogg*, 1 Meriv.

Ch. Ca. 654.

over if he dies, and the testator uses the words "leaves no such heirs," the settled construction was that it means "at his death;" according to the distinction in *Forth v. Chapman*, (y) which he thought ought to remain unshaken.

If a term be bequeathed to one for life, remainder to the heirs of his body, these last words are generally words of limitation, and the whole vests in the first taker: but if there appears to be any circumstance in the will to shew the intention of the testator, or if in the case of the limitation of the trusts of a term, it appears to be the intention of the parties that the issue should take by purchase the words, "heirs of the body" are not liable to the construction generally given them in the limitations of freehold estates. (z)

Where there was a bequest of a term to A. for life, and no longer, remainder to such issue as he should devise it to, it was held to give a life interest only, with a power to devise it to his issue. (a)

Leasehold estates when limited together with freehold in strict settlement, subject to a declaration or implied intention that they shall go together as long as the rules of law and equity will permit, vest absolutely on the birth of the first tenant in tail. (b) It will follow that if there is any trust which tends to restrict such absolute interest after it is once vested, it is absolutely void, and is incapable of any modification so as to establish it *cy pres*. In a case, (c) therefore, where the rents and profits of the leasehold estate were to go to the persons entitled to the rents and profits of the freehold and copyhold lands, although there was a power for the trustees with the consent of the persons so entitled, and if minors at the discretion of the trustees themselves, to sell such leasehold estates, and invest the produce in freehold estates to the same uses; yet it was held that since the leasehold estates vested absolutely in the first tenant in tail from the time of his birth, the power was absolutely void and incapable of any modification. This case, however, it may be observed, is an instance

(y) *Supra*.

(z) *Fearne's Ex. Dev.* 490. 6th edit. *Webb v. Webb*, 1 P. Wms. 132. *Hodgson v. Bussey*, 2 Atk. 89. *Ward v. Bradley*, 2 Vern. 23.

(a) *Target v. Gaunt*, 1 P. Wms. 432.

See also *Nichols v. Hooper*, *ibid.* 199. *Pinbury v. Elkin*, *ibid.* 564. *Pleydell v. Pleydell*, *ibid.* 748.

(b) *Lord Southampton v. The Marquis of Hertford*, 2 Ves. and B. 54.

(c) *Ware v. Polhill*, 11 Ves. 257.

only of an unskilful attempt to effect what may be done for the purposes of family arrangements, by means of covenants in marriage articles, and executory trusts in wills. It is obvious that if leasehold estates vest absolutely in the first tenant in tail of the freehold at his birth, the intention of the settlement which generally is that they should go in the same channel may be often frustrated; because, upon the death of such tenant in tail before twenty-one, the leasehold estate must become part of his personal property, and go in the channel appointed by law for that species of property. It is the usual practice therefore to limit the leasehold estates to trustees in trust to convey them absolutely to the person entitled to an estate tail in the freehold, when he arrives at the age of twenty-one; and no further precaution seems compatible with the rules of law, because at that age the law gives to the tenant in tail the absolute power of disposing even of his freehold property, by suffering a common recovery. Care, however, must be taken, that such executory trust is not too remote, by exceeding the limits for the taking effect of executory devises. (c)

In the case of the Countess of Lincoln *v.* The Duke of Newcastle, (d) before the House of Lords, Lord Eldon, in delivering his opinion, entered very fully into the question how far the court of Chancery would execute the intention of the testator, where there was no direct gift by the will, but only a direction that the leasehold estates should go in the same channel as the freehold; and the same reasoning applies to a covenant in marriage articles, because they are executory in their nature, and the intention is usually the same. If the matter were *res integra*, the best principle he thought would be that the testator ought to be considered as furnishing the court with all the means of enabling the party to tie up the property, not as long as the rules of law will admit, but to that convenient extent which would enable you to execute the general primary intent of the testator, or of the settlement to carry the real and personal estates in the same channel. It appears, however, that now the doctrine on the point has been definitively settled by Lord Thurlow in the cases of *Foley v. Burnell*, (e) and *Vaughan v. Burslem*. (f) In those cases Lord

(c) *Trafford v. Trafford*, 3 Atk. 347.

(d) 12 Ves. 225.

(e) 1 Bro. Ch. Ca. 274.

(f) 3 Bro. Ch. Ca. 101.

Thurlow thought that the court could exercise no discretion in modifying the limitations of such a will: but that there was only the choice of vesting the estate the instant a tenant in tail should be born, or carrying the limitation to the utmost extent the law would admit. In *Lady Lincoln v. The Duke of Newcastle*, the cause was heard on appeal from Lord Erskine's decree, which was made before the Duke of Newcastle had arrived at the age of twenty-one years. The decree, as far as related to the leasehold premises, declared that the said leasehold premises ought to be settled in trust for the Duke of Newcastle, his executors, administrators, and assigns; and if he should die under the age of twenty-one years, without leaving issue male of his body living at the time of his death, then in trust for the several tenants in tail in remainder, with like limitations over in case they should die under the same circumstances. Lord Eldon observed that a good deal of difficulty had been removed by the Duke of Newcastle having arrived at the age of twenty-one years since the decree: but if he had decided the cause originally, he should have decided it according to the authority of *Vaughan v. Burslem*. Under the authority of *Vaughan v. Burslem*, and *Foley v. Burnell*, assignments had been made of leasehold property, under the notion that a son when born should take an absolute interest; and to decide otherwise would tend to shake a very large property. The House of Lords varied the decree so far as to leave out from the word "assigns" the part of the decree above mentioned, stating it to be unnecessary to decide any thing respecting the point; and with this variation the decree was affirmed.

Whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect (if at all) within twenty-one years after a life in being, may be good in the event of no one of the preceding executory limitations, which would carry the whole interest, happening to vest. But when once one of the preceding limitations which carries the whole interest takes effect, that instant all the subsequent limitations become void, and the whole interest is vested. (g) Therefore (h) where the limitations of the

(g) *Higgins v. Dowler*, 1 P. Wms. See *Foster v. Brown*, Moor. 758.
98. Fearn. Cont. Rem. 407. 6th edit. (h) *Higgins v. Dowler*, *supra*.

trust of a term were to A. for life, remainder to his first and other sons in tail, and for want of issue male to his daughters, there never having been a son, it was adjudged a good trust for the daughters; and the contingency, being confined to a life in being, was not too remote.

An executory bequest, limited to take effect after a general failure of issue, is void in its creation: but, when applied to leasehold estates, the courts are inclined to interpret it dying without issue living at the death of the legatee. Where (i) therefore a man bequeathed a term of years to A., his heirs, executors, and assigns, for ever; and if he died before twenty-one leaving no issue, then over: this was held a good executory bequest. So also where (k) a term was bequeathed to one and the heirs of his body, and if he die without issue living then to B., this seems to have been considered a good executory bequest, the contingency being to arise within a life in being. (l)

In a recent case it was decided that a tenant for life of a term of years, which term was unimpeachable of waste, was entitled, as between herself and the persons claiming in remainder, to cut down and apply for her own benefit such timber as is fit and proper to be cut in the course of a due and husbandlike management of the woods in question. (m)

Having thus considered the limitations of terms of years, considering them as integral estates, it is necessary in conclusion to state in what cases a lease or term of years when renewed may be considered as so connected with the preceding estate, as to be capable of being limited by deed or will to the same uses.

In general, renewed leases which have been renewed in the right of the owner of the old lease, are subject to all the equity to which the old lease was liable. Where therefore a person by will bequeathing his personal estate for the payment of his debts

(i) *Martin v. Long*, 2 Vern. 151.

Wilkinson v. South, 7 T. R. 555.

Taylor v. Clack, 2 Eden's Ch. Ca. 267.

Lyon v. Mitchell, 1 Madd. Ch. Ca. 467.

Carr v. Lord Errol, 14 Ves. 470.

(k) *Lamb v. Ascher*, 1 Spink. 225.

(l) See *Fletcher's case*, 1 Eq. Abr.

193. *Love v. Windham*, 1 Lev. 290.

The Duke of Norfolk's case, 3 Ch.

Rep. 1. 2 *Swanst. Ch. Ca.* 454.

(m) *Bridges v. Stephens*, 2 *Swanst.*

150. n.

bequeathed the residue to his wife, who entered upon certain leasehold premises under a college lease, and then married, and afterwards her second husband being administrator *de bonis non*, suffered another to renew in the right of the testator, it was held that this renewed lease was liable to the debts of the testator if his assets were not sufficient. (x)

So where (o) a man had a church lease, of which nine months only were unexpired, and he devised all his interest in the old lease to B., and then renewed the lease and republished his will; the renewed lease was held to pass by virtue of the republication of the will. So a renewed lease will pass under a residuary bequest of all the testator's leasehold estate. (p) But if a lessee for years devises his term specifically, and then takes a new lease by which means the first is surrendered in law; it is, generally speaking, a revocation of his will. (q)

Leases, however, which are renewed in consequence of the tenant right of renewal, are at law new leases; and, if no equitable charge has been created previous to the surrender of the old lease, they are not liable in equity to any of the incidents of the old lease. (r) In the case of leases for lives, therefore, it has been determined that a new lease to the lessee and his heirs is a new purchase, and will devolve to the heirs *ex parte paterna*, although the original lease came from the mother. (s) So where (t) an act of parliament was obtained to enable A. with the concurrence of his lessor to grant leases of certain premises demised to A. under a church lease; A. having died intestate before any lease granted under the power, the power was held to have been destroyed by his administrator obtaining a new lease from the church; although, if the power had been executed during the existence of the old lease, the renewed lease would have enured to the benefit of the under-lessee.

So it has been decided (u) that a lease renewed subsequent to a general bequest of the testator's leasehold estate, or of all his

(x) *Edwards v. Lewis*, 3 Atk. 538.

(o) *Mason v. Day*, *supra*.

(p) *Anon.* 2 Freem. 116.

(t) *Collet v. Hooper*, *supra*.

(q) *Sterling v. Lydiard*, 3 Atk. 199.

(u) *Marwood v. Turner*, 3 P. Wms.

(r) *Ashby v. Laver*, Gouldsb. 93.

166. *Abney v. Miller*, 2 Atk. 597.

(s) *Mason v. Day*, Prec. Ch. 319.

Hone v. Medcraft, 1 Bro. Ch. Ca. 261.

Pierson v. Shore, 1 Atk. 480. *Collett*

Coppin v. Fernyhough, 2 Bro. Ch. Ca.

v. Hooper, 13 Ves. 258. *Wentw. Off.*

291. *Slatter v. Noton*, 16 Ves. 197.

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interest therein, is so far a revocation of his will. The only case (*x*) in which, under such general words, a subsequent renewal has not been held to produce this effect, was the case of a trust on which circumstance Lord Hardwicke seems chiefly to have relied. A. being a prebendary, leased the premises to one of his children for twenty-one years, with a declaration that it was for the benefit of the father, and then for such persons as he should appoint; and, in default of appointment, in trust for his children generally. This lease had been surrendered usually every year for several years; and then a new one had been made in the same way, with the same declaration of trust. Four or five years before his death, A. made his will, under which his eldest son was residuary legatee, and executor; and, by a supplemental clause, he directed that his eldest son should have the lease, with all the profits and advantages arising from it. Every year after that, till the death of the testator, the lease was renewed, with the same declaration of trust, as before his will was made. Besides, therefore, the circumstance of its being a trust, the words of the will took in all the benefits and advantages belonging to the trust, one of which was the right of renewal.

Where there are circumstances in the will to shew that the testator intended to pass the future interest, the renewed lease shall pass by the will, although it expire subsequently to the making of his will in his lifetime, and be renewed after his death by his executrix. In such a case it must be intended that the testator was tenant from year to year when he died, which is an interest transmissible to representatives; and then the executor taking such interest, is trustee for the uses of the will, and the renewed lease will follow the limitations in the will. (*y*) If the testator had been tenant at sufferance only, the renewed lease, it should seem, would have belonged to the residuary legatee (if any): because the tenancy would have been determined by his death; and it would have resembled the case of an executor becoming a general occupant of a freehold estate not specifically devised.

Upon the same principle as the case last cited, where (*x*) a testator being tenant from year to year, under St. John's College, Oxford,

(*x*) *Carte v. Carte*, 3 Atk. 174.

(*y*) *James v. Dean*, 11 Ves. 383.

(*z*) *Randall v. Russell*, 3 Meriv.

Ch. Ca. 120.

(the lease having expired) gave to his wife *durante viduitate* "all that his messuage or tenement, with the farm or lands at L., and all his estate and interest therein, she paying the rents reserved, to St. John's College, &c." The widow, after his death, obtained a new lease from the College. It was held that the new lease was taken subject to the trusts of the will.

The renewal of a college lease in his own name by a tenant for life, with power of appointment, has not the effect of executing the power in his own favour. (a)

It has been before mentioned that where terms are specifically bequeathed, they will, notwithstanding, first vest in the executor by virtue of his office; and the legatee cannot enter without the executor's special assent. After such assent, the entry of the executor is sufficient to charge the legatee with the possession and the liabilities of the tenancy. (b) Before assent, the legatee has no remedy for the term except against the executor personally: but it is said that a legatee may grant or release the term to the executor before assent. (c)

A letter promising to deliver possession on a certain day is a sufficient assent. (d) So words by an executor to the following effect,—“If E. my wife were dead, my estate in the premises would be ended, and it would remain to H.,” are a good assent to the remainderman. (e)

The assent of an infant executor, when there are no assets but the term, is not a good assent even at law. (f) But a feme covert executrix may assent if her husband do not contradict it. (g) And where a feme covert executrix declared that she would take the term according to the will, it was held to be a sufficient assent where the term was limited to her for life, with remainder over. (h)

So if there is a bequest of a term for life, with remainder over, an assent of the executor to the grant for life is an assent to the remainder over, even where the remainderman dies in the life of the legatee for life, and before the assent; and such an

(a) *Brookman v. Hales*, 2 Ves. and B. 45.

(b) 3 Leon. 6.

(c) *Carter v. Love*, Owen. 56.

(d) *Doe d. Lord Say and Sele v. Grey*, 4 Esp. N.P.C. 154.

(e) *Southward v. Millard*, March 137.

(f) *Chamberlaine v. Chamberlaine*, 2 Freem. 141.

(g) *Cooks v. Bellamy*, 1 Keb. 530.

(h) *Garrett v. Lister*, 1 Lev. 25.

assent is sufficient to transmit the remainder to the representatives of the remainderman. (i)

Where the testator bequeathed his term to his executor and died, and the executor entered before probate and died, this was held sufficient to vest the lease in him as legatee without probate: (k) but in general, if a term is bequeathed to an executor, he must lay special claim to it as legatee, because his entry, if it in the first instance is only as executor. But if the debts and funeral expenses have been paid, he may be said to be in as legatee without special claim, because he is no longer liable to a *devastavit*. (l)

Where it was shewn in evidence that the wife executrix and her second husband had made a lease, reciting her title as executrix, it was agreed by the whole court that this was an express claim as executrix. (m) In the same case it was likewise agreed, that if a feme executrix and legatee take husband before she has made an election, the husband may make it for her. If, however, an executor, being the specific legatee of a term, renounces the executorship, he cannot grant over without the assent of the administrator; because he has no general power of disposing of the property after he has declined the office. (n)

If the bequest be to several, one only of whom is executor, it is much more requisite that the executor should claim as legatee; because, if his general entry should be considered as an assent to the legacy, it would enure to the others as well as to himself, and thus make him liable to a *devastavit*. A legacy also is waivable; and if he should be construed to be in as legatee by his general entry as executor, the legacy would no longer be waivable, and the bounty of the testator would only operate to the prejudice of the executor. (o)

Where (p) a man seized of certain lands in fee, and also possessed of a term of years, devised all his lands and tenements to his two executors until the payment of his debts and legacies, it

(i) Southward v. Millard, *supra*.

Walkden v. Elkington, Plow. 519.

(k) Dy. 367. a. pl. 39.

(l) Bransby v. Grantham, Plow.

523. Young v. Holmes, 1 Str. 70.

Portman v. Willis, Moor. 352.

Gouldsb. 139.

(m) Cheney v. Smith, 1 Leon. 215.

(n) Broker v. Charter, Cro. Eliz. 92.

(o) 1 Brownl. 132. See Doe &

Hayes v. Sturges, 7 Term 817.

(p) Fannell v. Fern, Moor. 350.

See Dy. 93. b., and Simpson v. Cat-

teridge, 1 Madd. Ch. Ca. 612.

was a question whether the executors took as executors or legatees; for both the executors entered generally, and they severally sold the term to different persons. If they took as executors, the sale by the first was good, because one of several executors may administer alone; and if any injury is done, he is personally liable as between executors: but if they took as devisees, then the sale of each was good for a moiety of the term which each had a right to dispose of. The court determined that they took the land as devisees, and the term as executors; for the declaration in the will as to the term was only what the law would have said without such a declaration: but the executors could not have applied the land to the purposes of the will without the express declaration of the testator that they should take it for that purpose.

The law will imply an election to take as legatee, if the executor does acts which are consistent only with the character of legatee. Therefore, where (q) the testator having bequeathed to his wife the profits of the land during the minority of his son, to the intent that she might out of the profits educate his children, and having made his wife executrix, it was held that by her entry and educating the children of the testator, she had determined her election to take as legatee. So if the executor pay a charge which only attaches in his character of legatee, it is an assent. (r)

An executor is not obliged to pay legacies without a bond from the legatee to refund in proportion to the whole debt, if any such should appear. So also, although no bond should be given; yet in equity, if debts appear to be unsatisfied after the assent of the executor, the legatees must refund in the same proportion: for otherwise creditors would be without remedy, because, after assent by the executor, the legacy in the hands of the legatee is not attachable by foreign attachment, and creditors being third persons have no day in court to interplead. But a sale after such assent to a *bona fide* purchaser for valuable consideration without notice will defeat creditors. (s)

So where (t) the corporation of Canterbury had demised to the testator for years, at a certain rent, and under various covenants,

(q) *Paramour v. Yardley*, Plow. 2 Freem. 141.

539.

(t) *Simmons v. Bolland*, 3 Meriv.

(r) *Young v. Holmes*, 1 Str. 70.

Ch. Ca. 547. *Hawkins v. Day*, Amb.

(s) *Chamberlaine v. Chamberlaine*, 160.

the master of the rolls ordered the funds to be made over to the residuary legatee, on his giving a sufficient indemnity to the executor, in case any judgment should be recovered against him at law for any future breach of covenant; and it was referred to the master to settle the terms of the security.

III. The last point to be considered in this chapter relates to the assignment of the reversion.

At the common law it was not only necessary that the assignment of the reversion by the act of the party should be by deed as between the parties: but, in order to give the grantee a legal title to the services of the tenant, the tenant's especial assent was necessary to the grant of his landlord; which ceremony was called attornment. The necessity of attornment was in some measure avoided by the statute of uses, and by the statute of wills, which vested the legal estate in the *cestui que* use and the devisee respectively without attornment. By the stat. 4 Ann. c. 16. s. 9., (u) commonly called the statute of attornments, it was at length enacted that all grants and conveyances of the reversion or remainder of any messuages or lands should be good without attornment of the tenants; provided that no such tenant should be damaged by payment of rent to the grantor or conusor, or by breach of any condition for nonpayment of rent before notice given him of the grant by the grantee or conusee. And after this statute it was enacted by the stat. 11 Geo. II. c. 19. (x) that the attornment of tenants to strangers claiming title to the estates of their landlords should be absolutely null and void to all intents and purposes whatsoever provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to or in consequence of any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after default in payment of the mortgage money.

It is observable that in the statute of 4 Ann. the only species of hereditaments named are "manors, rents, remainders, and reversions." The reason is that attornment was requisite only where there was tenure, attendance, remainder, or payment of rent out of land: therefore the reversion, after a grant of common of pas-

(u) Irish Stat. 9 Ann. c. 10. s. 9,
and 10.

(x) Irish Stat. 15 Geo. II. c. 8. s. 7
and 8.

ture, will pass without attornment, because attornment never was necessary. (*y*)

A grant to the king, or by the king to another, was always good without attornment, by force of his prerogative. (*x*) So also, as far as the parties were concerned, the estate passed by the deed *ab initio*; although the subsequent assent of the tenant was necessary to give it permanence. (*a*)

If lands be let for life or years, and the reversion is afterwards mortgaged, the lease protects the possession of the tenant against the mortgagee: the rent, however, is in the mortgagee by right. By a tacit arrangement the mortgagor, although not accountable for the profits to the mortgagee, usually receives the rents: but the mortgagee may put an end to this arrangement by requiring the payment of the rent to himself. And, although the lease protects the possession of the tenant, the courts have allowed the mortgagee to bring an action of ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor: for since the mortgagor himself, if in possession, could not be ousted without a judgment in ejectment; so neither can the mortgagee entitle himself to the rent in respect of the reversion without a judgment of a similar nature.

Attornment was necessary before the statute of 4 Ann. on the principle of notice to the tenant: but, when it took place, it related back to the time of the grant. On the same principle, after notice, the mortgagee is entitled to the rents, without prejudice to the tenant, from the time that his legal estate in the premises commenced. In the statute 4 Ann. there is a provision that the tenant shall not be prejudiced by any act done by him, as holding under the grantor till notice. Payment before such notice, of rent actually due, is good: but with this protection the tenant must be considered to have attorned at the time of the execution of the deed granting the reversion. Where, (*b*) therefore, the mortgagor became bankrupt, and the rent had been demanded by his assignees before notice of the mortgage, but had not been paid, it was held that the mortgagee, after giving notice, was entitled as well as if it had accrued after notice. The tenant had received

(*y*) Co. Litt. 312. a.

(*x*) Co. Litt. 309. b.

(*a*) *Ibid.* 310. b.

(*b*) *Moss v. Gallimore*, Dougl. 379.

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(y) Co. Litt. 319. a.

(x) Co. Litt. 309. b.

(a) *Ibid.* 310. b.

(b) *Moss v. Gallimore*, Dougl. 379.

no injury; he had the rent still in his hands, and was bound to pay it according to the legal title.

Although, in the case of copyhold leases, the tenure is suspended so that no action of ejectment can be maintained of the copyhold interest during the common law lease; (c) yet the copyholder may, notwithstanding, surrender the reversion by the name of the reversion, though the lease is not directly derived out of the customary estate; and, after the grantee is admitted, he is in the post by a kind of act in law, in the way of inrolment, and needs no assent or attornment of the tenant. (d)

By the stat. 14 Geo. II. c. 20. (e) all common recoveries in the courts of Westminster, or any other courts having jurisdiction, are valid without the surrender of freehold leases, and without the concurrence of the lessees in possession: but the person having the first estate for life in reversion must make a tenant to the *præcipe*.

In all common cases of the grants of reversions there can be no doubt when the vendor ceases to be landlord, and when the right of the vendee begins. In the early cases, however, there seems to have been some doubt whether the bargainee was entitled to the rent accrued after the bargain and sale, and before inrolment: but it seems to be clear, that if the deed is inrolled, the bargainee after inrolment will be entitled to all arrears from the execution of the deed. (f)

Since borrowing money upon annuity has prevailed, it has been the usual practice to insure the payment of the annuity by a term of years in addition to the usual powers of distress and entry on default of payment. It is sometimes a question under the deeds creating the term how far, and in what manner, the trustee of the term has the power of using the legal estate. The usual trust of the term is to permit the grantor to receive the rents; and the trustee, though he has the legal estate, cannot make use of it till default has been made in payment for a certain number of days. He then becomes a trustee for both parties, the grantor

(c) *Murless v. Franklin*, 1 Swanst. Ch. Ca. 13. *Swift d. Farr v. Davies*, 8 East, 354. n.

(d) *Swinerton v. Miller*, Hob. 177. *Scibby v. Beck*, Lit. Rep. 17. 4 Leon. 230. 1 Leon. 297.

(e) Irish stat. 21 Geo. II. c. 11: See also the stat. 8 Geo. I. c. 6. s. 12. Irish.

(f) Godb. 156. *Hall v. Dew*, Latch. 157. *King v. Somerlad*, Al. 19.

and grantee: to the latter to raise the arrears, and to that extent he is entitled to the rents. If he takes more rents than are sufficient to satisfy the arrears, he is bound to pay the surplus to the grantor. If he receives enough for that purpose, he is bound to permit the grantor to receive the remainder. In a late case (g) arising out of a transaction of this kind, the Lord Chancellor, in order to avoid the necessity of an ejectment by the trustee, made an order that the grantor should receive the rents so as to preserve the possession of the trustees, in order that the tenants might not be able to deny the tenancy to the trustees: and for this purpose directed that the receipts for rent should be given by the grantor in their names, the defendants (the trustees) undertaking to produce any leases which had been granted of the estate.

If the reversion be extended under an *elegit*, all that the sheriff can do is to put the plaintiff in the situation of the landlord as to one moiety: he may set it out by metes and bounds, and the lessee is bound thenceforward to pay a moiety of the rent to the tenant by *elegit*. And no attornment was ever necessary, because the tenant by *elegit* was in by judgment of law. (h) If, however, one *elegit* has extended one half of the rent; a second can only extend one half of the residue, or a quarter of the whole. (i)

If land is bound by a statute, and an extent issues, the reversion will not be affected by it before the *liberate* is awarded; for the language of the writ before that, when it speaks of seizing into the king's hands, is but formal, and land is never seized by virtue of the *extendi fucius*. (k)

Although it is in general true that rent is incident to the reversion, yet it may be observed again in this place that the reversioner has the power of severing it from the reversion by granting it to a stranger. In that case the law will give the grantee an action of debt for the recovery of it; and if he grant it to several persons in separate portions, each may have an action for his separate portion. (l) Before the statute of attornments, attornment was

(g) *Jenkins v. Milford*, 1 Jac. and W. 529.

(h) *Rogers v. Pitcher*, 6 Taunt. 206.

(i) *Burham v. Bayne*, 2 Brownl. 97.

(k) *Playne's case*, Cro. Eliz. 46.

Grubham v. Thornborough, Hob. 82.

(l) *Goodwin v. Packer*, Tho. Jon. 1. *Cox v. Robins*, Tho. Raym. 10.

Ards v. Watkins, Moor. 549. *Austin*

v. Smith, 1 Leon. 315. *Browlow v.*

Henley, 1 Lord Raym. 82.

the usual mode of transferring the privity requisite to maintain that action. Since that statute, the law implies a privity of the same kind after notice of the grant to the tenant. (m)

A widow may be endowed of the rent and reversion of an estate of inheritance leased for years previous to the coverture. It is said, however, that if she recover in dower at law, the writ shall be special; that the sheriff may come on the premises, and demand seisin for the feme; whereby she shall have her moiety or third part, as the case may be, of the rent and the reversion. Otherwise, if she had judgment only, with a *quod cesset executio*, she would be deprived of the rent. (n)

If the rent on a term be so reserved as to have continuance after the death of the ancestor, the heir on whom the reversion descends is entitled to the rent of freehold lands. And if the lessor leave a son and a daughter by one *ventre*, and two daughters by another *ventre*, the receipt by the son of rent accruing after the death of the father is a sufficient *possessio fratris* to carry the reversion to the daughter of the first *ventre* in exclusion of the sisters of the half-blood. If, however, the lands demised be copyhold lands, the effect will not be the same: for the possession of the lessee under a common law lease can never be said to be the possession of the copyholder, which for this purpose should be a customary possession; and, therefore, after the death of the son, all the daughters shall have the reversion and rent incident thereto by descent, although the brother of the half-blood has been in seisin of the rent. (o)

All arrears of rent become due in the lifetime of the ancestor belong to his personal representative, and not to the heir, because rent when due is a debt due by contract in the same way as any other personal debt contracted by the lessee.

If the ancestor die on the rent day, payment to him on that day will be valid against the heir: but payment before the rent day is no satisfaction in law, although it might be in equity. So also if the rent be unpaid, and the lessor dies before midnight, the heir, and not the executor, will be entitled; for rent is not due before midnight, although, to take advantage of a condition of re-entry, it should be demanded before sun-set. (p)

(m) 3 Salk. 48.

(n) *Wheatley v. Best*, Cro. Eliz. 560.

(o) 4 Leon. 212.

(p) *Clunn's case*, 10 Rep. 127. *Co. Litt.* 315. n. *Lord Cromwell v. An-*

draws, Cro. Eliz. 15. *Lord Rockingham v. Penrice*, 1 P. Wms. 177. *Cutting v. Derby*, 2 Bl. Rep. 1077. *Leftly v. Mills*, 4 T. R. 173.

Before the stat. 11 Geo. II. c. 10. (q) if the lessor tenant for life died within the half-year, at the end of which rent was due, the rent reserved upon a lease not made in execution of a power was lost, because the representatives could not recover a part. The principle was that the contract for each portion of rent was entire; and, therefore, it could not be apportioned. In some cases the law qualified this principle: but in no case with respect to time. Courts of equity, however, always distinctly admitted of an apportionment in respect of time. (r) And the stat. 11 Geo. II. c. 19. s. 15., according with the equitable practice, provided that where such a lessor, tenant for life, should die before the rent day, his executors might recover from the tenant a proportionate part of the rent so growing due, making all just allowances, (s) The Irish statute 23 and 24 Geo. III. c. 46. provides for a similar apportionment where the *cestui que vie* of an estate *pur autre vie* dies before the rent-day, a case not adverted to by the English statute 11 Geo. II.

In *Paget v. Gee* (t) Lord Hardwicke intimated an opinion that tenants in tail after possibility of issue extinct and tenants for years determinable on lives were within the equity of the statute; and that whatever the courts of law might do, courts of equity would direct an apportionment in such case. And in *Whitfield v. Pindar*, C. B. 1781, the court is said to have held that a tenant in tail dying without issue capable of taking the estate tail was also within the statute, so as to entitle the executor to an apportionment against a remainder-man. (u) The executor of a tenant *pur autre vie* seems on the same principle to be within the statute, as the case is certainly within the mischief intended to be remedied: but the point does not appear to have been decided. In a note, however, to Sir W. D. Evans's valuable edition of the statutes, (v) that learned person thinks that this last case is certainly not within the fair interpretation of the words of the statute.

(q) 23 and 24 Geo. III. c. 46. Irish.

(r) *Jenner v. Morgan*, 1 P. Wms. 392. *Hay v. Palmer*, 2 P. Wms. 502. *Bentham v. Alson*, 2 Vern. 204.

(s) *Vernon v. Vernon*, 2 Bro. Ch. Ca. 659. *Hawkins v. Kelly*, 8 Ves. 308. *Aynsley v. Woodsworth*, 2 Ves. & B. 331. *Williams v. Powell*, 10 East.

289. *Sutton v. Chaplin*, 10 Ves. 66. And Evans's Statutes, Part IV. Class xix. No. 23.

(t) *Ambl.* 198.

(u) *Wykham v. Wykham*, 3 Taunt. 331.

(v) Part IV. Cl. xix. No. 23, note 14.

Where (x) a tenant for life with a leasing power made some leases according to his power, and others as limitations only of his interest, reserving rent at Michaelmas and Lady-day, and died on Michaelmas-day about noon. As to the leases derived out of his interest as tenant for life, the executors were declared entitled to it rather than it should be lost: but as to the leases under his power, there the remainder-man was entitled, because before the last instant of the day the representatives of tenant for life could make no title to it.

The stat. 19 and 11 Will. III. c. 16.(y) carries the intermediate profits, as well as the estate to posthumous children. If, therefore, a rent day occurs between the death of the father and the birth of a posthumous child, he will be entitled to the rent under the act.(z)

If the father make a lease for life, reserving rent, and dies, there can be no *possessio fratris*; for to make a *possessio fratris*, it is necessary that the son by the first *coincide* should be seized of the freehold. And the receipt of rent is not sufficient to create such a possession, although the son receive it in respect of the reversion: for to this intent the possession of the lessee for life is not the possession of the reversioner.(a)

If by any act of law, such as by descent, the reversion on the premises demised becomes divided into several parts; as if, for instance, lands of inheritance at common law and lands in gavelkind or Borough-English be leased together by the same ancestor, on his death the rent will be apportioned between the heir at common law, and the heir by the custom. So if freehold and leasehold lands be demised in one lease, on the death of the lessor the rent will be apportioned between the heir and the executor.(b) So also, although it seems to have been formerly doubted whether rent might be apportioned on the grant of a part of the reversion, because an entire contract could not be divided by the act of a party, so as to subject the tenant to several actions and distresses; yet it has long since been held

(x) The Earl of Stafford v. Lady Wentworth, cited 1 P. Wms. 180. Lord Rockingham v. Penrice, 1 P. Wms. 177. Norris v. Harrison, 2 Madd. Ch. Ca. 268.

(y) Irish stat. 8 Ann. c. 4.

(z) Bassett v. Bassett, 3 Atk. 203.

(a) Co. Litt. 15 a. n. 5. Amey v. Cooke, 11. 88. S. P. Trin. T. 1657., between Piper and Masters, MS. Rep. by Glyn. J.

(b) Huntley v. Roper, 1 And. 21.

otherwise; for the reversion being in its nature severable, the rent which is incident to it may be naturally severed too; and, moreover, it would have been extremely prejudicial to lessors if they could not make provision for younger children, or other family contingencies. (c) The rent may also be apportioned on a devise of the reversion in part. (d) It seems to be a question, however, whether the apportionment can be made without the aid of a jury. (e) A somewhat different question arose in the case of *Walter v. Maunde*. (f) There on a sale by lots stating that certain parts were in lease, and that the purchaser of such particular lots would be entitled to an apportioned part of the rent of such parts it was held that the landlord might make a good title without the consent of the tenant; for here it is not necessary to consider what remedies a purchaser can have, but whether he can have a title.

If freehold and copyhold lands are leased at an entire rent, and the lessor grant the reversion in both to the same person, the rent is still entire, although the conveyance of the reversion in each case is distinct; and after admittance the reversion in the hands of the assignee is an entire reversion:—in declaring for it, however, the truth must be stated as it really is. (g)

If a man lease a house and furniture, reserving one rent for the house, and another for the furniture, a judgment creditor will be entitled to the rent of the furniture: but, if one entire rent be reserved, it cannot be apportioned for his benefit; for the whole issues out of the realty. (h)

The reversion to which rent is incident, and on which the whole relation of landlord and tenant depends, is the immediate reversion: if, therefore, the immediate reversioner surrender his estate, or it becomes merged by the accession of the next immediate estate in reversion, the rent and all the benefits of the contract are gone with it. But where (i) a feme tenant for life with reversion to two coparceners joined with one of them in making a lease of the whole premises reserving rent, and then she and

(c) *West v. Lascelles*, Cro. Eliz. 851.

(d) *Gilb. Reats*, 173. *Godb.* 95. *Dy.* 4. b. Cro. Eliz. 771.

(e) *Bliss v. Collins*, 1 Jac. and W. 426.

(f) 1 Jac. and Walker, 181.

(g) *Collins v. Harding*, Cro. Eliz. 622. See 3 Vin. Abr. 10. pl. 2 in marg.

(h) *Cadogan v. Kennett*, Cowp. 432.

(i) *Farrar v. Johnson*, Cro. Eliz. 294.

the two coparceners levied a fine *sur comusance de droit come ceo*, &c. the court seemed inclined to think that the feme's joining in the fine did not extinguish the rent. It is clear that if tenant for life alone had leased, rendering rent, and then had joined in such a fine, the rent would have been extinguished in the hands of the conusee, because the reversion to which it was incident would have been merged in the greater reversion conveyed by the coparceners: but as the case stood, since one of the coparceners had joined in the lease, the lease was a charge upon a moiety of the reversion after the determination of the estate for life, and consequently for such moiety in the hands of the conusee the rent would have existence; and that, without apportionment, because it was reserved to one coparcener by the original contract.

The assignee of part of the reversion is in the same situation, with respect to covenants running with the land, as he is with respect to the rents; the law adapting the contract to the relative situation of the parties: but conditions of re-entry were not equally favoured, because they tended to the defeazance of the estate demised. Such conditions may be apportioned by act of law; as, for instance, where freehold lands and lands in borough-English are leased together, at the lessor's death, a condition will be apportioned, and each kind of heir, *viz.* at the common law and by the custom, may enter for conditions broken into his respective part; therefore, where the heir in borough English purchased the reversion in the freehold of his elder brother, it was held that he might take advantage of the condition in the whole, because the condition had been apportioned by act of law, (k) and the condition may also be apportioned by the act and wrong of the lessee. (l) But the condition was extinguished at the common law, if the lessor by his own act parted with the reversion in the whole or any part of the land demised. (m) The law, however, is in some respects different now by force of the stat. 32 Hen. VIII. c. 34, (n) by which it is provided that as well every person which shall have any grant of the king of any reversion of lands, which pertained to any monasteries, as also all other persons being

(k) Moor. 115. See Godb. 2.

(l) Co. Litt. 215 a.

(m) Moor. 97. Lee v. Arnold, 4

Leon. 29. Winter's case, Dy. 308 b.

Co. Litt. 215 a.

(n) Irish Stat. 10 Ch. I. stat. 2. c. 4.

grantees or assignees of the reversion of any lands from any other person or persons, and their heirs, executors, successors, and assignees, shall have like advantage against leasees, by entry for nonpayment of rent, or for doing waste or other forfeiture, as the lessors or grantors themselves ought or might have had.

This statute extends to grants made by the successor of the king, although the king only is named in the statute. (o) So the assignee of part of the reversion, if it be immediate on the particular estate is within the statute: (p) but where (q) the person entitled to the immediate reversion acquired the inheritance in fee, by which the immediate reversion was extinguished, it was held he could not have the benefit of the statute, because the reversion to which the rents and covenants were incident was extinguished. On the same principle if a husband possessed of a term in the right of his wife underlet for years on condition, the wife surviving cannot enter, because she is by title paramount and not possessed of the reversion to which the condition was attached: neither can the executor of the husband enter, for he would be entitled to no estate if he entered.

A devisee of a reversion is an assignee within the statute; (r) and so is the assignee of the reversion of copyhold land. (s) For it was said that the only reason why copyhold lands were not considered within the province of other statutes containing general words, was because of the lord's prejudice: but in this case no prejudice could arise to the lord; and since it was a remedial statute, it must be construed in the most liberal and beneficial manner. But with respect to estates created by law, such as dower, the law, as it stood before this statute, does not seem to be affected by it; therefore a tenant in dower cannot enter for a condition reserved to the lessor and his heirs.

So, with respect to apportionment of conditions, the statute seems to have made no difference in the common law. The assignees, therefore, of the reversion in part of the lands are not within the equity of the statute, to take the benefit of conditions

(o) Co. Litt. 215 a.

(p) Co. Litt. 215 a. *Kidwelly v. Brand*, Plow. 70. *Bristow v. Bristow*, Godb. 161.

(q) *Webb v. Russell*, 3 T. R. 403.

(r) *Machell v. Dunton*, 2 Leon. 33.

(s) *Glover v. Cope*, 3 Lev. 326. *Heydon's case*, 3 Rep. 8 a. *Beal v. Brazier*, Cro. Jac. 305. *Platt v. Plummer*, Cro. Car. 24.

of re-entry; (d) although they may have the benefit of covenants running with land; for by the express words of the statute the assignee of the reversion can be in no better situation than the reversioner. Now if the lessor assigned his reversion in part, his right of entry would be clearly gone: but the lessor might maintain covenant notwithstanding such assignment: the assignee, therefore, is entitled to the benefit of covenants, but not of conditions of re-entry. (u) The king, indeed, at the common law had the advantage of a condition after the grant of the reversion in part: but his patentee is not in a better situation than other assignees, because of the king's privilege in respect of his person. (x)

As the privilege given by the statute extends only to covenants running with land; so also the assignees are allowed the benefit only of conditions for nonpayment of rent, and noncommission of waste, and other forfeitures of a similar nature; for so the words "other forfeiture" must be intended: (y) Therefore the assignee of the reversion cannot only not take advantage of a condition to pay a sum in gross: (z) but if there be an entire condition of re-entry for the nonpayment of rent, and for not repairing, and also for the payment of a sum in gross by way of fine, this being a collateral payment will vitiate the condition altogether, since it cannot be divided by the act of party. (a)

The assignee may sue both the lessee and his assignee in possession at the same time for breaches of covenant running with the land: but execution can be taken out only against one. (b) So the lessor or his assignee may, after granting the reversion, by force of the same statute bring covenant against the assignee of the lease for arrears due before the grant of the reversion. (c) But the privity given by the statute extends no farther: for it is called a *quasi* privity of contract in respect of the estate; and where the privity of estate fails, this will fail also. (d)

(d) Per Periam J. in Knight's case, Moor. 203.

(u) Twynam v. Pichard, 2 B. & A. 106. Kitchin v. Compton, 1 Sid. 157.

(x) Knight's case, 5 Rep. 55 b.

(y) Co. Litt. 215 b.

(z) Chaworth v. Phillips, Moor. 876.

(a) Dekins v. Latham, Styl. 316.

(b) Bro. Car. 32. Godb. 270. Bret v. Cumberland, Cro. Jac. 399. 521. Ashurst v. Mingay, T. Jon. 144. Parker v. Webb, 3 Salk. 5. Edwards v. Morgan, 3 Lev. 233.

(c) Midgley v. Lovelace, Carth. 290.

(d) Barker v. Damer, Carth. 183.

In *Inherwood v. Oldknow*, (c) it was held that covenant might be maintained on a covenant running with land by the remainder man on a lease by tenant for life under a power.

Before we conclude this chapter it may be observed that we have hitherto considered the relation of landlord and tenant as affected only by lawful acts either of the tenant or the landlord. The obligations of the contract however may be materially affected either by the tortious acts of the reversioner, or by lawful eviction by strangers claiming either under or paramount the lessor. In these and some other cases there is necessarily a partial or total change in the state of the reversion, either absolutely or for a time only. The effect produced is either a suspension or an extinguishment of the contract, in the whole or in part.

To occasion a suspension of the rent, there must be an expulsion of the lessee out of all or some part of the premises; and a keeping out of possession till after the rent becomes due. (f) It has been indeed argued that any entry, whether lawful or tortious, of the lessor would suspend the rent; as if, for instance, the lessor should take an underlease of part of the premises: but this opinion seems to be clearly erroneous; for in such a case the lessor must be taken to enter with the consent of the lessee, and therefore there can be no expulsion so as to suspend the rent. (g) Conditions however must necessarily be suspended, whether the lessor enters legally or illegally: for if the lessor takes an underlease or an assignment of an underlease of part of the premises, if the condition is not thereby suspended, it will be to the prejudice of his own estate. (h) So also, if rent is suspended, the lessor cannot take advantage of a condition of re-entry, because that would be to give him the benefit of his own wrong. (i)

If the lessor enter without ousting the tenant; although he damages the premises irreparably, it will not be a sufficient entry to suspend the rent. (k) So, although if there is no exception of

(c) 3 M. and S. 382.

Roll. Abr. 938.

(f) Co. Litt. 148. b. *Hunt v. Cope*, Cowp. 242. *Reynolds v. Buckle*, Hob. 326. *Dorrel v. Andrews*, Hob. 192. *Arnold v. Foot*, 3 Keb. 453. 1 Brownl. 138.

(h) *Rawlins's case*, 4 Rep. 52.

(i) *Timbrek v. Bullock*, Styl. 446.

(g) *Hodgkin v. Thornborough*, 1 Freem. 404. *Dorrell v. Andrews*, 1

(k) *Cherbourn v. Rye*, Cro. Eliz. 341. *How v. Broom*, Gouldsb. 125. *Harrison's case*, Clay, 34. *Roper v. Lloyd*, T. Jon. 142.

trees, if the lessor cut down the trees, it works no suspension of rent, because the body of the trees belongs to the lessor, and only the boughs and shade belong to the lessee, for the loss of which he has his proper remedy. (l) But if the lessor enter and oust the tenant, it is not material whether he continues on the land after entry, for the possession will be in him sufficient to suspend the rent till the lessee does some act which amounts to a re-entry. (m) The re-entry of the lessee will revive the rent. (n) So if the lessor after ousting the lessee enfeof a stranger, and then the lessee re-enter, this will also revive the rent; and give it to the feoffee as assignee under the stat. 32 Hen. VIII. (o)

If the rent be not *in esse*, it is incapable of suspension or extinction; therefore, where A. grants a lease to commence *in futuro* reserving rent, and the lessor before the time for the commencement of the lease makes a feoffment, it seems to be clear that the feoffee, after the time fixed for the commencement of the lease in possession will be as much entitled to the benefit of the contract as the feoffor would have been, although the lessee should not enter. (p)

Where (q) the lessee died, and his administrator entered, and then waived the term without waiving the administration, it was held that entry and occupation by B., (a stranger) by permission of the reversioner did not suspend the rent, for the waiver of the term by the administrator was void, and the entry of B. was merely a trespass: but it might have been otherwise, if the reversioner had commanded B. to enter and oust the lessee.

If the lessor take the assignment of an underlease of part from a stranger, there can be no apportionment properly so called; although in effect, if a rent be due both ways, the one payment may be set off against the other. So if the lessee lease to the lessor reserving rent, the parties by the lease may themselves be considered as having apportioned the rent upon the premises; and therefore there is no necessity for the law to do it for them. Lord Hale thought, however, that if the lessee leased to the lessor without rent, there should be an apportionment. (r)

(l) *Farby v. Clarke*, 2 Roll. Rep. 398.

(m) *Cibell and Hill's case*, 1 Leon. 110.

(n) *Timbrell v. Bullock*, Styl. 446. Page v. Farr, Styl. 443.

(o) See 4 Leon. 29.

(p) 1 Dy. 31. a. pl. 210.

(q) *Haydon v. Godsale*, Palm. 150.

(r) *Hodgkin v. Thornborough*, 1

Freem. 401.

If the land be evicted by title paramount, the lessee is discharged of the rent from the time of eviction: but is still liable for the rent due before the recovery, for he came in under the sanction of a legal contract, and therefore is liable as long as he enjoyed; nevertheless, if the eviction take place in the middle of a quarter, there can be no apportionment as to time. (s) If part only is evicted, the rent is discharged only in proportion to that part. (t)

If a right of common only is recovered, there can be no apportionment at law: but in equity the rent would be apportioned, unless the lands appeared notwithstanding to be well worth the rent. (u)

If the lessee surrender a part, or the lessor enter for a condition broken into part, then clearly there shall be an apportionment. (x) With respect to time, it appears that there can be no apportionment in the case of common persons, where the tenancy happens to terminate in part in the middle of a quarter. If, however, tenant for years of the crown rendering rent surrender in the middle of a quarter, the king shall not lose the rent as in the case of common persons, if the thing demised be land of which the profits increase *de die in diem*: but the king shall have a proportionate part from the last rent day. If the subject of the demise be incorporeal, such as a reversion, the same rule, however, does not hold. (y)

If land be destroyed by the act of Providence, as if part be surrounded by water, there shall be an apportionment. (z) But if land together with a stock of cattle reserving one rent are leased together, and the cattle die, there seems to be some doubt whether the rent shall be apportioned. Several justices and serjeants were of opinion that it should be apportioned; others *contra*: but all thought it equitable that it should be apportioned. And afterwards the case was argued by Moore in his reading; and it seemed to him and to Brooke, Hadley, Fortescue,

(s) Gilb. Rent, 146. 10 Rep. 128. a.

(t) 2 Roll. Abr. 325. Dy. 56.

(u) 1 Ch. Ca. 32. Sanderson v. Harrison, Cro. Jac. 679. Tew v. Thackwell, 2 Freem. 174. Arnold v. Foot, 3 Keb. 453.

(x) Moor. 114. Fish v. Campion,

3 Vin. Abr. 11. pl. 5. See 3 Vin. Abr.

12. pl. 12. *in marg. contra*.

(y) The King v. The Farmers of the Customs, Litt. R. 140.

(z) 1 Roll. Abr. 236.

and Brown, J. J. that the rent should be apportioned, inasmuch as no default was in the lessee; (a) but it seems that as the rent issues out of the land alone, if the land be evicted there shall be no apportionment. (b)

It is the province of the jury to make the apportionment, which may be done on a plea of *nil debet*: the tenant may also set forth the value of the land evicted in cases of eviction, or otherwise as the case may be; and conclude that the rent shall be apportioned. The court therefore cannot make an apportionment on demurrer: but there seems to be no objection to the lessor, and the grantee of the reversion (c) with the consent of the lessee, making a valid apportionment. (d)

(a) Anon. Dy. 56.

Emott v. Cole, Cro. Eliz. 255.

(b) See Bro. Apport. 7. 9. 24. Taverner's case, Dy. 56. a. Dormer v. Clarke, Dy. 110. a. Rede v. Modry, 1 And. 4. Reade v. Lance, Dy. 212. a.

(c) Smith v. Malings, Cro. Jac. 160. 1 Ventr. 276. 1 Roll. Abr. 237.
(d) Anon. Moor. 114. 3 Vin. Abr. 17.

CHAPTER V.

ON RENT, AND THE SEVERAL REMEDIES FOR THE RECOVERY
OF IT, TOGETHER WITH THE SEVERAL ACTIONS WHICH ARISE
OUT OF THE RELATION OF LANDLORD AND TENANT.

It has been already stated incidentally, that rent, if reserved generally during the term, is payable by intendment of law at the end of every year; but it is not due till midnight of the rent day. The place of payment is the land; unless in the king's case, where the proper place appointed by law is the office for the receipt of dues in the Exchequer. In common cases, distress on the land, is a sufficient demand, where there is no penalty or forfeiture incurred by neglect of payment: but since rent may be reserved payable at a place off the land, in that case distress on the land does not include a demand; but the law has ordained that a special demand must be made at the place appointed. (a) And if the lessee may pay his rent at S. or D., it must be demanded at both places; for the lessee has his election to pay it at either. (b)

If the lessor come upon the land and demand the rent of J. S., a stranger, this demand is said not to be good, because he has mistaken the person, J. S. not being chargeable with the rent: but a general demand, without reference to any person who is not chargeable, is good. If, however, a person leases rent, rendering rent whenever he shall demand it; there, if the lessor come to the land to demand it before the end of the year, his demand upon the land is not good unless the lessee is there also: for the time being uncertain when he would demand it, he should give notice of his intention to the lessee. So if he demand it personally of the lessee off the land it is not sufficient, because the land being the principal debtor, the payment must be made there. If, however, the lessor stays till the end of the year, then the lessee

(a) Gilb. Rents, 78.

(b) 2 Roll. Abr. 428.

at his own peril ought to attend upon the land to pay it, because the end of the year is the time prescribed by law for the payment of the rent. (c)

Payment by the tenant to the bailiff of the lessor is sufficient payment to acquit him of all further liability. So if a receiver be appointed by the court of Chancery, (d) or creditors appoint a trustee (e) to receive rents for the payment of debts, the estate will not be charged with any loss arising from the failure of the trustee. And the same rule applies where a testator appoints a trustee: his defaults will affect the devisee or legatee, and not the estate; (f) otherwise it might be an encouragement to trustees to misapply the money. (g) It has been thrown out by Lord Thurlow as his opinion, that if a receiver be appointed by the court of Chancery, at the instance of a mortgagee or other incumbrancer, and the receiver afterwards embezzle or otherwise waste the rents, the loss will fall on the mortgagor, and not on the mortgagee. (h)

I. The most simple and obvious remedy which the law has given to the landlord for recovery of rent, and to compel the performance of services, is by distress. Distress is the power of seizing the cattle, and other goods and chattels of the tenant, or of any other person on the land, and retaining them as pledges or as a pain to compel the performance of the obligations of the contract. And at common law the matter rested there; for the landlord had no further right, because it was supposed that the tenant would comply with the demand of the landlord in consequence of the inconvenience arising from the detention of his goods. But in process of time, the pain being found ineffectual, the legislature by several acts permitted the landlord attending to certain requisites pointed out by those statutes to appraise and sell the distress, and to satisfy himself out of the proceeds of the sale. (i)

But a landlord has no right to distrain, unless there be an

(c) *Stweton v. Cush*, Yelv. 37.

Wms. 518.

(d) *Rigge v. Bowater*, 3 Bro. Ch. Ca. 365.

(h) See *Rigge v. Bowater*, 3 Bro. Ch. Ca. 365.

(e) *Hutchinson v. Lord Massereene*, 2 Ball and Beatty, 49.

(i) English statutes, 2 W. and M. sess 1. c. 5. and 11 Geo. II. c. 19. s. 8. Irish stat. 25 Geo. II. c. 13. s. 5.

(f) *Anon.* 1 Salk. 153.

(g) *Carter v. Barnardiston*, 1 P.

actual demise to the tenant at a fixed rent ; and, therefore, where there was a memorandum of agreement only to let on lease, with a purchasing clause, and no rent had been subsequently paid, the landlord could not distrain. The only remedy in such a case is by an action for use and occupation. (*k*)

The power of distraining does not take its origin from the feudal law ; for according to the feudal law a default of services was attended with forfeiture : but when the rigour of that system was mitigated, the mode of enforcing the same obligation by distress was imported from the civil law, according to which the land was considered as hypothecated to the tenant ; and the profits only were liable to be seized in satisfaction of the money agreed to be paid for the use of the land. But though the remedy by distress was thus transferred from the civil law ; yet, since it came in the stead of feudal forfeiture, it retained one peculiar characteristic of forfeiture : for as no one could take advantage of forfeiture by defect of fealty or other services but the lord ; so the remedy by distress for rent was at the common law inseparable from the reversion. If, therefore, the landlord granted the rent to a stranger, the stranger had no power of distress of common right ; because this in the hands of the stranger became a rent-seck. The law, however, is now altered in that respect by the stat. 4 Geo. II. c. 28. s. 5. (*l*) which gives the like remedy by distress and sale for the recovery of rents-seck as for rent-services. It is the essence of rent-charges that a power of distress should be given to the grantee by the deed creating them.

But it may be here noticed that it has been more than once determined that if a lessee for years assign his term, reserving a rent, with no clause of distress, he cannot distrain for the rent either by the common law, or by the statute. (*m*) To understand the principle of these decisions, it should be recollected that rents were formerly created only in three ways, whence they acquired the distinctive names of rent-service, rent-charge, and rent-seck. Before the statute of *quia emptores* all rents reserved upon a grant of land in fee simple were rent-services : because a tenure might exist between the feoffor and feoffee. After that statute, a rent reserved upon a grant in fee was not held to be altogether void :

(*k*) *Dunk v. Hunter*, 5 B. and A. 322.

(*l*) Qu. Irish Statute.

(*m*) ——— *v. Cooper*, 2 Wils. 375.
Parmenter v. Webber, 2 B. Moor. 656.

but since no reversion remained in the feoffor, the remedy of distress was wanting; neither had he any remedy by action, if he never was seized of the rent. (n) Another mode of making a rent-seck was in the manner just before mentioned, namely, where the landlord severed the rent from the other services, and granted it by deed to a stranger: in that case it became a rent-seck, neither could the lord grant such a rent with a distress. (o) But it does not appear that a rent *de novo* could ever have been reserved as rent-seck out of any less estate than an estate in fee simple. So again, if a rent *de novo* was granted in fee tail or for term of life, (p) (and Littleton here adds, &c., which, I conceive, to include a rent for a term of years,) without a clause of distress, this was a rent-seck: but the addition of a clause of distress would have made it a rent-charge. The court in the above cited case of ——— v. Cooper, which was an action of replevin, thought the case so clear for the plaintiff, that they gave judgment for the plaintiff without hearing his counsel. The reporter adds the following observation by the court:—"There are two ways of creating a rent: the owner of the lands either grants a rent out of it, or grants the lands and reserves a rent; there is no such thing as a rent-seck, rent-charge, or rent-service issuing out of a term of years. Bro. Dette, pl. 39. cites 43 Edward III. 4. per Fynechden, Chief Justice, C. B. If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear: this case is law, and in point; therefore, if the avowant will recover what is owing to him from the plaintiff, he must bring his action upon the contract. Judgment for plaintiff *per totam curiam*." The Year-book referred to by Brook is 45 Edward III. 8 A. pl. 10.; and is to the effect stated in the case cited: but I think it is scarcely reasonable to bring it forward as an authority in point; for admitting the position to be true, as it undoubtedly was at the time, still it might have been a rent-seck, and the question still might have remained open to discussion upon the operation of the stat. 4 Geo. II. c. 28. The cases cited, however, have now settled the point. The only further remark which seems necessary is upon the words "or grants the lands and reserves a rent," (q) which most obviously mean "grants lands in fee simple, &c." as far as rents-seck are concerned. A rent

(n) Litt. s. 217.

(p) *Ibid.* s. 218.(o) *Ibid.* s. 227.(q) ——— v. Cooper, *supra*.

for equality of partition is not a rent-service, but a rent-charge of common right; and, therefore, may be distrained for. (g)

Where a lessee for ninety-nine years made a lease for forty years, and died leaving A. his executor, who died leaving B. his executor; it was held that B. might distrain at common law, and in his own right for rent incurred in A.'s lifetime. (r) But the executors or administrators of tenants in fee simple or fee tail, and the executor and administrator of tenants for term of lives, could not recover at common law the arrears of rent due to their testators or intestates during their lives; nor could the heirs of such tenants in fee simple or fee tail, nor any person having the reversion of the estate after the decease of any of the tenants above mentioned, distrain for such arrears: it was, therefore, enacted by the stat. 32 Hen. VIII. c. 37. s. 1. (s) that the executors and administrators of such persons should have a double remedy, either by action of debt, or by distress against the tenant from whom such rents were due, and those claiming under him. This statute is remedial in its nature; and extends as well to the executors and administrators of tenants *pur auter vie*, living *cestui que vie*, as to the executors and administrators of tenants for the term of their own lives. It does not seem, however, to have altered the common law so as to give an action of debt in cases where the common law did not otherwise permit it to be brought: executors, for instance, of tenant *pur auter vie* had at common law an action of debt only after the death of *cestui que vie*; and the statute does not seem to have given them any right to bring such action in the life of *cestui que vie*. It has only given them an immediate power of distress to which they were not entitled before, and thus has given them an immediate remedy where they had none before. Again, an action of debt for rent reserved on a freehold lease would not for a long time after that statute lie during its continuance; and, consequently, the statute never could have been understood to give such action contrary to the general doctrine of the common law. (t)

It has been recently contended that this statute does not apply to rents reserved on an estate for years. (u) In the case cited the

(g) Litt. s. 253.

(t) Co. Litt. 262. b. See Hoole v.

(r) Wade v. Marsh, Latch. 211.

Bell, 1 Lord Raym. 172.

(s) Irish stat. 10 Ch. I. sess. 2. c. 5.

(u) Meriton v. Gilbee, 8 Taunt.

s. 1.

159.

point did not fairly arise ; because from the form of the pleadings it appeared that it was not necessary to consider the question. But Burrough, J. seemed to be strongly of opinion that the statute included all rents whether on an estate for years or freehold. The question related to the first section of the statute, by which it is enacted that the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, of rent-services, rent-charges, rent-seck, and fee farms due to the testators in their lives, may distrain upon the lands, tenements, and other hereditaments charged with the payment of such rents, or fee farms, and chargeable to the distress of the testator so long as the said lands, tenements, or hereditaments continue, remain, and be in the seisin or possession of the tenant *in demesne* who ought immediately to have paid the said rent or fee farm, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent in like manner and form as their said testator might or ought to have done in his lifetime ; and that the said executors or administrators shall for the same distress lawfully make avowry upon their matter aforesaid. Burrough, J. observed that “demesne” in this statute, as applied to the tenant to be distrained upon, meant only occupation ; and mentioned the case of *Powell v. Killick* (x) which, he said, he was rash enough to say he thought well decided. That case is given in 1 Selw. N.P. 645. 4th edit. in a note to the case of *Renvin v. Watkin*. The case of *Powell v. Killick* (y) was an action of trespass against the executor, who had distrained under the statute, and the objection in question was taken at *nisi prius* ; but was overruled by Lee, C. J., who said that this was a rent-service, the testator being in his lifetime seized in fee, and the plaintiff holding under a tenure which implied fealty. The same case is to be found in Serjeant Hill’s MSS. 14 D. 72. and Bull. N. P. 57. In the latter place Mr. Justice Buller, although he mentions this case, observes that Lord Coke, by his manner of stating the effect of the statute, seemed to be of opinion that it did not extend to a rent reserved on a lease for years ; and “I apprehend,” says the learned judge, “that it is not, for the

(x) M. 5 Geo. II. B. R., 1 Selw. N. P. 664. n.

(y) Midd. Sittings, 25 Geo. II.

landlord is not tenant in fee, fee tail, or for life of such a rent ; and it is the executors of such tenants only who are mentioned in the act."

The case of *Renvin v. Watkin* (x) is thus stated :—A. seized in fee let to the plaintiff for twenty-one years, and afterwards dying seized of the reversion, the defendant administered and distrained for a half-year's rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected that there was not any privity of estate between the administrator and the lessor ; and, therefore, the avowry which is in the realty could not be maintained by him. And it was observed, this was a case out of the statute 32 Hen. VIII. c. 37. ; for that only gives a remedy by way of distress for rents of freeholds ; and of *this opinion the court seemed*.

These are the only cases which bear directly on the point : in the case of *Turner v. Lee* (a) the general effect of the statute was taken into consideration. In replevin the defendant avowed as executor for the arrears of a rent-charge granted to the testator for years, if he so long lived. All the court resolved that it was not within the statute : for that, they said, provides remedy only where the testator died seized of a rent to him and his heirs, or for life, and by his death there was no remedy for the executor ; as it appears by the preamble of the statute. But where he hath remedy by the common law by action of debt, as in this case the executor hath, he cannot distrain. Mr. Hargreave in his note upon the passage of *Co. Littleton* relating to this point, (b) has observed that the preamble of the statute afforded countenance to the construction of the court in *Turner v. Lee*, but that in *Cro. Eliz.* 332. it seems to have been taken for granted that the statute did not operate thus restrictively. And in *Hoole v. Bell* (c) he states an instance of the extension of the remedy given by the statute, as well to cases in which executors had a remedy before the statute as to those who had no remedy whatsoever : and he adds, "ever since too this last case I apprehend the law to have been taken accordingly."

The note by Mr. Hargreave immediately preceding the last is also worthy of notice, as the same kind of inference as that made by Mr. Justice Buller (d) is stated to have been made from

(x) *Supra*.

(a) *Cro. Car.* 471.

(b) *Co. Litt.* 162. a.

(c) 1 Lord Raym. 172.

(d) *Supra*.

another passage of Lord Coke's comment upon the same statute. Lord Coke observes that the preamble of the statute concerning executors or administrators of tenants for life is to be intended of tenant *pur autre vie* so long as *cestui que vie* liveth. "Which passage," observes Mr. Hargreave, "has been cited to prove that Lord Coke was of opinion against extending the remedy of the statute to the executors of a tenant for his own life, who before the statute were entitled to an action of debt, but could not distrain. But I think that Lord Coke was misunderstood. He appears to me to have merely intended to guard against an error of law into which the generality of the preamble of the statute might lead uninformed persons: the preamble reciting that the executors of tenants for life had no remedy, without distinguishing what kind of tenants for life; whereas, in truth, the executors of tenant for his own life, and also the executors of tenants *pur autre vie* after death of *cestui que vie*, had remedy by action of debt before the statute. That it was not the meaning of Lord Coke to restrict the benefit of the statute to cases in which there was no remedy before, and on that account to exclude the executors of tenants for their own lives from the remedy of distress given by the statute, is to me clear; because he himself states, both in a preceding and subsequent paragraph, that the statute sometimes operates by adding a remedy to that before existing at common law." This reasoning, indeed, is not sufficiently applicable to the next observation of Lord Coke, where he says, "If a man make a lease for life or lives, or a gift in tail reserving a rent, this is a rent-service within this statute," to rebut directly the inference made by Mr. Justice Buller:—Admitting, however, the opinion of Lord Coke to have been as it has been implied by Mr. Justice Buller, it is clear that succeeding times have been more liberal in their interpretation of the statute, and a rent reserved generally on an estate for years being a rent-service, no great violence will be done to the words, by including a case which otherwise must be considered as excepted for no adequate reason. That the statute gave an essential advantage in all cases to which it extended is evident from the observation of Lord Coke which immediately follows that just mentioned. The distress, he observes, is the more plain and certain remedy than the action of debt; for the action of debt must be brought against them that took the profits when the rent became behind or against their executors or administrators: but the distress

may be taken upon the land, be it either in the tenant's own hands, or in the hands of any other that claims by or from him, that is, by interpretation under him, by purchase gift or descent.

By the third section of the same statute it is further enacted, that the husband shall after the death of the wife in her right have action of debt, or distrain for arrearages due to her in her lifetime. The husband by the common law could not have had the arrears due before marriage: but for those which became due during coverture, the husband, before this statute, was entitled to an action of debt. The effect, therefore, of this clause is to give him the arrears due before marriage, and a double remedy for the same, and an additional remedy by distress for the arrears during coverture. (d)

All manner of arrears of rent issuing out of the land, whether consisting of money, corn, cattle, fowls, pepper, spurs, gloves, or any other profit to be delivered, are within the statute: but work-days or any other corporal services are not within it. Neither are arrears of a *nomine pœnæ*, although incident to the reversion like rent; for being only a penalty, it does not grow due with every gale of rent, but only arises casually; and, therefore, it has always been considered as a mere chattel, for which the proper remedy is by action of debt.

At the common law the recoverors in a common recovery had no remedy to recover their rents; for they could not compel the tenants to attorn; neither could they compel payment by distress or action, before they obtained seisin of the rent by some voluntary act of the tenant. The statute 7 Hen. VIII. c. 4., (e) therefore, enabled such recoverors, their heirs and assigns, to distrain for rents and services, and to justify for the same in the same way as those from whom they recovered might have done. (f)

Distress may be made either in person or by a bailiff. No written authority is necessary to enable the bailiff to distrain, not even in the case of a corporation aggregate. (g) It is said, however, on the authority of the Year-book 16 Hen. VIII. 2. b., that there is a distinction in this respect between a corporation aggre-

(d) Co. Lit. 162. b. See the Duke of Albemarle v. Cutler, 3 Keb. 697. Wife v. Bellent, Cro. Jac. 442. Bowles v. Poor, Cro. Jac. 283.

(e) Irish stat. 33 Hen. VIII. sess. 1. c. 13. s. 2.

(f) Dy. 31. a. 1 Prest. Shep. T. 47.

(g) Cary v. Mathews, Salk. 191. Manby v. Long, 3 Lev. 107.

gate having a superior, and corporations aggregate not having a head: and that in the latter case they cannot give such an authority, but by specialty in writing under their common seal. (*h*)

In the Court of Chancery the practice is, that a receiver may distrain upon his own discretion for rent in arrear within the year: but, if in arrear for more than a year, then an order is necessary. (*i*)

If there are two coparceners, joint-lessors, one alone cannot distrain for a moiety of the rent: for since they make but one heir to the ancestor, the services are entire, and they make but one landlord to the tenant. One, however, may distrain for the entire rent, partly in her own right and partly as bailiff to the other coparcener. (*k*) The same law is of joint-tenants being joint-lessors, because they claim under one title, and together make but one landlord; (*l*) and that without any actual authority, as was held in the case of coparceners in gavelkind, (*m*) who are coparceners by custom, and so considered by Littleton. (*n*) But no such rule affects tenants in common under similar circumstances; for although a tenant holding under two tenants in common, joint-lessors, may pay the whole rent to one of them; yet if he does so after notice from the other to retain one moiety, he is liable to be distrained upon by such other for his share, without the concurrence of the first. (*o*)

Where the tenant has made no tender of the rent, no demand is requisite previous to making the distress, because distress is itself a demand in law of the rent. But if the tenant has tendered his rent at the day it became due, and the landlord refused to receive it; or if the landlord has not been upon the land for the purpose of receiving it when tendered, he must give the tenant notice before he can distrain, because the tenant has not omitted on his part to perform the duty incumbent on him. If

(*h*) *Randal v. Dean*, 2 Lutw. 1496.
Nela. Lutw. 481. Vin. Abr. vol. 3. 538.
c. 5. in marg.

(*i*) *Brandon v. Brandon*, 5 Madd. Ch. Ca. 473.

(*k*) *Page v. Stedman*, Carth. 364.
Stedman v. Bates. 1 Ld. Raym. 64.
Bro. Abr. Trav. 118.

(*l*) *Pullen v. Palmer*, Carth. 328.

Duppa v. Mayo, 1 Saund. 387. *Rogers v. Tanfield*, Cro. Eliz. 340. Anon. 13 Mod. 96. Year-book, 15 Hen. V. 17. a.

(*m*) *Leigh v. Shepherd*, 2 Brod. and B. 465.

(*n*) Litt. ss. 241. and 265.

(*o*) *Harrison v. Barnby*, 5 T. R. 246.
Ward v. Everard, 1 Salk. 390.

the tender has been made only on the land, then a demand after the day on the land is sufficient, because the demand is of equal notoriety with the tender: but if the tender has been made to the person, it seems to be the better opinion that the demand must be made to the person upon the same principle; namely, that the demand may be equally notorious with the tender. (*p*) Notice of the distress need not be given at the house or other principal place on the premises: it is sufficient if the tenant be personally made acquainted with it. (*q*)

The landlord cannot distrain on the rent day, because the rent is not due till midnight. (*r*) In general, also, it seems to be essential to rent, that it should be payable at the end of the portion of time for which it is a consideration; and, therefore, it is not distrainable for before the expiration of that period: but this may be regulated by the agreement of the parties. If, therefore, the rent be made payable at the beginning instead of the end of each quarter, there is no objection to the landlord's distraining after the day of payment. (*s*)

At the common law no distress could be made, but during the tenancy. The landlord, therefore, could not distrain after the expiration of the lease, even where the tenant held over: consequently, where the tenancy expired on the next day, he had no remedy for the rent accrued on the last rent day, but an action of debt. (*t*) By the stat. 8 Ann. c. 14. s. 6. and 7. (*u*) he is enabled to distrain for arrears after the expiration of the term, provided his title continues, and provided the distress is made during the possession of the tenant from whom the arrears are due. (*v*) The words "or those claiming under him" are added in the Irish stat. 9 Anne, c. 8.

The stat. Ann. c. 14. has been construed liberally in favour of landlords: where, (*x*) therefore, by the custom of the country, a tenant is entitled to an away going crop, and to house it in barns

(*p*) Gilb. Rent. 82. Cranley v. Abr. 672. Harrison v. Metcalf, Cro. Kingswell, Hob. 207. Jac. 442.

(*q*) Gilb. Rents, 87.

(*u*) Irish statute, 9 Ann. c. 8. s. 7.

(*r*) Clun's case, 10 Rep. 127. b. and 8.

Duppa v. Mayo, 1 Saund. 287.

(*v*) Braithwaite v. Cooksey, 1 H. Bl.

(*s*) Taylor v. Buckley, 2 T. R. 603. 465.

(*t*) Doct. and Stud. 2. b. c. 9. Bro. Distr. 19. Co. Litt. 47. b. 1 Roll.

(*x*) Beavan v. Delahay, 1 H. Bl. 5.

upon the premises for a certain time after he has quitted the premises, the contract is considered as having continuance beyond the original term, so that the landlord is not restrained to six months after the term; but he may distrain corn so left after that time.

Although the statute gives a power only to distrain during the possession of the tenant from whom the arrears became due; yet, if the tenant die before the end of the term, and his administrator take possession, and continues in possession after the expiration of the term, a distress may be made under the statute for the arrears during the whole term, as well during the occupation of the tenant himself as during the possession of the administrator. (y)

The king by his prerogative may distrain on any lands of his tenant: but in the case of ordinary persons, distress can only affect the premises out of which the rent issues; A landlord, therefore, cannot justify the taking a joint-distress for two separate rents; for each rent issues out of its own premises; and, by taking a joint distress for both, it does not appear that one part has not been made liable to more than its proper share of distress. (x) If, however, a tenant confound boundaries for the purpose of preventing a distress, the landlord is entitled to a commission from a court of equity to ascertain them.

If the landlord coming to distrain sees the cattle on the premises, and the tenant in order to prevent a distress drives them away, the landlord may freshly pursue them and distrain them: but he cannot distrain them, if after he sees them they leave the premises of their own accord. So if they were removed clandestinely, though for the purpose of preventing a distress, the common law did not allow the landlord to follow them: but by the stat. 8 Ann. c. 14. s. 2. (a) extended by the stat. 11 Geo. II. c. 19. ss. 1. and 2., (b) if, after rent becomes due, the tenant clandestinely drives away his goods, the landlord may within thirty days after (twenty days in Ireland (c)), pursue and seize them, wherever they are to be found, by way of distress; and dispose of them in the same manner as if distress had been made on the premises.

The landlord however cannot seize any such goods and chattels

(y) *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(z) *Rogers v. Birkmire*, Cas. temp. Hardw. 245.

(a) Irish stat. 9 Ann. c. 8. s. 3.

(b) Irish stat. 15 Geo. II. c. 8. s. 1.

(c) See Irish stat. 15 Geo. II. c. 8.

in the hands of a *bona fide* purchaser for valuable consideration : but to deter tenants from such fraudulent conveying away their goods and chattels, and others from wilfully aiding and assisting them therein, all persons so offending are liable to pay to the landlord double the value of the goods so removed, to be recovered by an action of debt in the courts of Westminster, or in the courts of session in the counties palatine of Chester, Lancaster, and Durham, or in the courts of great session in Wales, wherein no essoign, protection, or wager of law, shall be allowed, nor more than one imparlance. (d) In an action founded on this provision, a variance in stating the amount of rent arrear is not material. (e) In Ireland the double value may be recovered by civil bill process, (f) where the value of the distress is within 20*l*.

Where the goods so clandestinely removed do not exceed the value of 50*l*., the remedy for the double value is more expeditious; for the landlord or his bailiff on application by writing (not an oath) (g) to two justices, (who may summon the parties and examine witnesses on oath) may obtain an order from such justices under their hands and seals against the offenders to pay such double value; and the penalty may be levied by distress and sale of the goods of the offenders; and for want of such distress the offenders may be committed to the house of correction, there to be kept to hard labour for the space of six months, unless the money so ordered to be paid shall be sooner satisfied. The judgment however of the justices is subject to appeal to the quarter sessions, who may determine the appeal, and give such costs to either party as they think reasonable. It is provided also that where the party appealing shall enter into a recognizance with one or two sufficient sureties, in double the sum so ordered to be paid, with condition to appear at such general or quarter sessions, the order of the said two justices shall not be executed in the mean time. The decision of the quarter sessions is final.

In *R. v. Middlehurst* (h) an order of justices for assisting in fraudulently removing or concealing goods was held good: and if goods are removed from one county to another, the proceeding may be before the justices in either. (i)

(d) *Gwinnett v. Philipps*, 3 T.R. 643.

(e) *Ibid.*

(f) Irish Stat. 15 Geo. II. c. 8. s. 3.

(g) *R. v. Bissex*, Burn. tit. Distress.

(h) 1 Burr. 399.

(i) *R. v. Morgan*, Cald. 166.

In *R. v. Bissex*, (*k*) a proceeding under this section of the act was ruled to be an order, and not a conviction; and that therefore it was not necessary to set out the evidence: and several objections to the form of the order in respect of the particulars necessary to be stated were overruled. Upon the same distinction it was ruled in *R. v. Middlehurst* (*l*) that the offence might be set out disjunctively as above mentioned. But in *R. v. Morgan*, (*m*) it seems to be treated as a conviction.

This statute seems to be defective in one particular, namely, that it does not seem to extend to cases where the goods have been clandestinely removed a short time previous to the rent being due. Such a case is certainly within the mischief intended to be remedied by the act; and Lord Ellenborough, C. J. in one case (*n*) thought there was ground to contend that it was within the provisions of it: but he had great doubts respecting the point. The goods also must be removed secretly, and not in the open face of day.

By the eighth section of the same statute landlords may seize as a distress for arrears of rent any cattle or stock of their respective tenants, feeding or depasturing upon any common appendant or appurtenant, or in any way belonging to all or any part of the premises demised or holden. (*o*)

The king may distrain in any lands of his tenant: but if the king's tenant has made a lease of other lands of his own, the king cannot distrain the goods of the underlessee. So if the lands of the tenant other than those demised are extended by *elegit*, the king cannot distrain there: but it seems to be doubtful whether he may not distrain, notwithstanding a sequestration out of Chancery, because it is a personal process. (*p*)

Where tithes or incorporeal hereditaments, or any goods and chattels, are demised separately, reserving rent, since no rent issues out of them, it is a mere personal contract; and the remedy by distress is inapplicable, (*q*) unless in the case of the king who may reserve rent out of incorporeal hereditaments, and may

(*k*) Burn's tit. Distr.

(*l*) 1 Burr. 399.

(*m*) Cald. 156.

(*n*) *Furneaux v. Fotherby*, 4 Campb. N. P. C. 136. *Watson v. Pain*, 3 Esp. N. P. C. 15.

(*o*) Irish Stat. 15 Geo. II. c. 8. s. 5.

(*p*) *The Attorney-general v. Coventry*, 1 P. Wms. 306. *Bligh v. Lord Darnley*, 2 P. Wms. 622.

(*q*) Willes 50.

distrain for such rents in all the lands of his lessee: but, in doing so, he cannot take by way of the distress the tithes or other matter which is the subject of the grant. (r)

If land and goods are demised together at one entire rent, as in the case of a farm with stock, or of ready furnished lodgings, the landlord may distrain on the land for the whole rent, because no rent issues out of the goods: (s) but the goods themselves cannot be distrained, although the reservation is greater on their account. (t)

The landlord cannot distrain in the night, because the tenant has not thereby notice of the distress, so as to make a tender of his rent; which he might possibly do to prevent the consequences of distress. (u)

Distress may be taken in a house, if the outer door be open; or if a window is open, the landlord may enter the house through it: (x) but he cannot break open an outer door or a window for the purpose of making the distress, although if the outer door is open, and he enter, he may break open an inner door. (y)

A landlord cannot enter into his tenant's barn if locked, or if there is a padlock thereon. (z) But by the stat. 11 Geo. II. c. 19. s. 7. (a) if goods or chattels are fraudulently removed and placed in any dwellinghouse, barn, or outhouse, which is locked, or otherwise secured to prevent a distress, the landlord taking to his assistance the constable or peace officer of the district, or if it be a dwelling, taking an oath before some justice of the peace of there being a reasonable ground to suspect that such goods and chattels are therein, may in the daytime break open and enter into such place as he might have done by virtue of that or any former act, if such goods and chattels had been put into any open field or place.

Where (b) a landlord occupied an apartment over a mill demised to a tenant, which was divided from it only by a boarded floor; it was held that no trespass would lie against him for

(r) See 1 P. Wms. 306.

(x) 1 Roll. Abr. 671. 5 Rep. 92. a.

(s) *Newman v. Anderton*, 2 N. R. 224.

(y) Comb. 71.

(t) *Reade v. Lance*, Dy. 212. b.

(z) 9 Vin. Abr. 128. pl. 6.

Bean. 81. Bro. tit. Lease, 23.

(a) Not adopted in Ireland.

(u) Doct. and Stud. 75. a. Co. Litt. 562.

(b) *Gould v. Bradstock*, 4 Taunt.

142. a. Gilb. Dist. 46.

taking up the floor of his own apartment, and entering through the aperture to distrain for rent. In order to make out his case, the tenant ought to shew that the boards were his sole property: if they were the ceiling of the room below, he could be but tenant in common of them; and, although he might have some remedy for being disturbed in the use of his ceiling, he cannot maintain trespass, for after the landlord had removed the floor he might enter without trespass.

The power of distress was originally confined to the seizing the issues and profits of the land: but all the chattels of the tenant both animate and inanimate, have long since been considered, with a few exceptions, as liable to distress. The exemptions which have been made have arisen in some cases from the local position of the chattels in question, and in others the nature of the things themselves have been considered sufficient to exempt them.

By the stat. 51 Hen. III. (c) beasts of the plough are not distrainable in favour of husbandry, if other sufficient distress may be found; and sheep are entitled to the same exemption. But if the landlord distrain *inter alia* his tenant's cattle and beasts of the plough, and it turn out after the sale, judging from the result, that in point of fact there would have been sufficient to satisfy the rent due, and the expenses of distress without taking them, such distress is not thereby proved to be illegal, and contrary to the stat. 51 Hen. III., if there were reasonable grounds for supposing, from the appraisement of competent persons at the time, that there would not be sufficient without taking the beasts of the plough. So it seems that no order is required by law to be observed in the sale of such goods, as that the beasts of the plough should be postponed to other goods; nor is it therefore a cause of action, if the distress be not wrongful. (d)

Utensils of trade, such as a carpenter's axe or a tapeloom, if in actual use, are not distrainable, because it is said it would lead to a breach of the public peace. (e) So wearing apparel is exempt: but not, if not in actual use. (f) So a horse on which a man is riding cannot be distrained: but if a man is riding one horse, and leading another, the led horse is not privileged. (g)

(c) Stat. 4. *De Distractione Scaccarii*.

(d) *Jenner v. Yolland*, 6 Price 3.

(e) Co. Litt. 47. a. *Simpson v. Har-*
topp, Willes 512. *Gorton v. Falkner*,
4. T. R. 565.

(f) *Bissett v. Caldwell*, Peake
N. P. C. 36.

(g) *Viscountess Bindon's case*, Moor.
214.

A ferry boat may be distrained for the rent of a ferry; and so may a ship in a dock for the rent of a dock. (h)

Chattels liable to distress must be moveable chattels; therefore fixtures, such as furnaces and cauldrons, and the doors and windows of a house, cannot be distrained. (i) So the anvil in the smith's shop, although removed out of its stock, or a millstone, although removed out of a mill to be picked, are exempt, because they partake of the nature of fixtures in the same way that a key is part of a lock: but if there are two millstones, and one only is in use, the other being a spare one, the spare one may be distrained. (k)

It is laid down in the old books in a general way that deer, conies, and other animals which are *feræ naturæ*, cannot be distrained: but at the present day deer may be distrained for rent, if kept in an inclosed ground, and principally for profit. Such animals were formerly kept only in forests and chases, or in such parks as were parks either by grant or prescription. They were, therefore, considered rather as things of pleasure than profit: but if they are kept for profit, they do not differ in their nature from other cattle. (l)

Money cannot be distrained, because there is no mark by which the pieces may be identified, so as to be restored in case the tenant is entitled to their restoration: but a bag containing money, especially if sealed, is not perhaps liable to the same objection. (m)

Sheaves of corn could not have been taken at common law, because all pledges were to be returned in the same plight and condition in which they were taken; and the removal of these sheds and scatters the grain; they could not therefore be restored in the same condition, in case such restoration should be afterwards awarded. For the same reason, hay in a cock or barn could not be distrained; yet at common law corn or hay in a cart might have been distrained, together with the cart itself, because then the pledge might have been removed without damage to the owner, and might likewise have been restored in the same condi-

(h) *Vinkinstone v. Ebdon*, Carth. pl. 6.

357.

(i) *Davies v. Powell*, Willes 46.

(j) *Co. Lit.* 47 a.

(m) 1 Roll. Abr. 666. H. pl. 4. Wil-

(k) Year-book, P. 14 Hen. VIII. *son v. Duckett*, 1 Freem. 302.

tion. (n) This law, however, was considered inconvenient to the landlord, and too great an encouragement to the tenant to withhold his rent: it is provided therefore by the stat. 2 W. and M. sess. 1. c. 5., (o) that landlords may seize for rent arrear any sheaves or cocks of corn loose in any barn or hovel, stack, rick, or otherwise on the land; and, in order that the tenant may receive no injury, the landlord is enabled to secure it on the premises as a pledge for the rent without removing it.

So at the common law growing corn or other produce could not be distrained, for it was liable to even more injury than corn in sheaves: but now by stat. 11 Geo. II. c. 19. s. 8. (p) landlords may distrain growing crops of grain and other produce; but they cannot gather them till ripe, although their lien upon them takes effect from the time of the distress. By s. 9. of the same act notice of the place where the goods are deposited must be given to the tenant, and left at his last place of abode; and if before such distress shall be ripe and cut, carried or gathered, the tenant, his executors, &c. shall pay the rent in arrear, or make lawful tender thereof, the distress shall cease, and the corn so distrained shall be delivered up. Trees growing in a nursery, and removeable by tenant, are not distrainable under this act for rent. (q)

It has been said, that since the distress is for an entire service, that a cart or a waggon, and a team of horses drawing it, is one inseparable distress, and that the landlord cannot distrain part without the rest. But this opinion seems to be erroneous; and it is obviously for the public benefit that the landlord should have the power of taking one or more horses in the team for distress, and leaving the rest. It does not appear that a man being in the cart would exempt the cart or horses from distress. (r)

The landlord is not restrained by law from taking the property of strangers, if he finds them on the premises, for the rent of the tenant. When the forfeiture of the feud was changed into the

(n) *Cooper v. Pollard*, W. Jon. Ireland.

197.

(q) *Clark v. Calvert*, 3 B. Moor.

(o) Irish stat. 7 W. III. c. 22. s.

96. *Clark v. Gasgarth*, 2 B. Moor.

4.

(r) *Tunbridge's case*, Cro. Eliz. 7.

(p) The stat. 56 Geo. III. c. 88.

Webb v. Bell, 1 Sid. 440. *Welch v.*

s. 15. extends the provisions of the
stat. 11 Geo. II. c. 19. s. 8. to

Bell, 2 Keb. 529, 595. *semble*, S. C.

milder remedy by distress, the right of distress was extended to the taking the cattle of strangers, in order that the tenant might not disappoint the lord by stocking and grazing his land with other men's cattle. If the stranger suffered, it was considered to be by his own default, in permitting his cattle to trespass on another's soil. In the civil law this rule prevailed in *prædiis urbanis*, but not in *prædiis rusticis*. (s)

If, however, cattle escape from the land of one person into that of another, where the division ought to be protected, a distinction has been made. If they escape by default of the owner of the cattle in not repairing his own fences, the landlord may distrain the cattle so escaping without giving notice to the owner, and that as soon as he finds them on his tenant's land. But if the tenant as representing the landlord, or the landlord, ought to keep in repair the fences between the tenant and his neighbour, the landlord cannot distrain the cattle of the neighbouring occupier, so escaping into the tenant's land by defect of the intervening fences, without giving notice to the owner, even where they have been *levant* and *couchant* on the land. If he give notice to the owner, and the owner refuse or neglect to drive them away in a reasonable time, the landlord may distrain them, though they have not been *levant* and *couchant*. (t)

The stat. 11 Geo. II. c. 19., which empowers landlords to follow goods fraudulently and clandestinely removed off the premises to prevent distress, only applies to the goods of a tenant, and not to those of a stranger; and therefore, a plea justifying the following goods, and distraining them for rent arrear, must shew that they were the tenant's goods. (u)

The right of landlords to distrain the property of strangers is founded on reasons of public convenience: but there are some exemptions to this rule also, which are in favour of trade and commerce. Thus things delivered to persons in the exercise of their trades, such as cloth in a tailor's shop, (x) or a horse in a smith's forge, (y) or the goods of a principal in the hands of a

(s) Dig. l. 20. t. 2.

(u) Thornton v. Adams, 5 M. and S.

(t) Dy. 317. b. Kempe v. Crews, 38.

1 Lord Raym. 167. Anon. 3 Salk.

(x) Simson v. Harcourt, cited 4 T.

136. Lacey's case, Palm. 43. Jordan

R. 568. See Simson v. Hartopp, Willes,

v. Martin, 1 Mod. 63. 2 Saunders,

512. S. C.

289. n. 7. by Serjt. Williams.

(y) See 12 Mod. 217.

factor, (s) cannot be distrained. Neither can the things of guests in a public inn be distrained : but livery stables are not exempt ; therefore, horses and carriages standing at livery may be distrained for the rent of the livery stables. There is no analogy between innkeepers and the keepers of livery stables. Inns are *publici juris*, and innkeepers are by law obliged to receive all guests coming to the house : but livery stables are let on private contract, and the owner may refuse to take carriages and horses except on his own terms. (a)

Cattle belonging to a drover being put into a field with the consent of the occupier for one night, on their way to a fair or market, seem not liable to distress for rent to the landlord. (b) The case of *Foulkes v. Joyce* (c) is contrary : but that decision, it has been thought, would probably now be overruled. The owner of the cattle in that case was afterwards relieved in equity, on the ground of fraud in the landlord, who had consented to the cattle being put into the close, and afterwards distrained them for rent : and the landlord was decreed to pay all the costs both at law and in equity. (d)

Where (e) a clothworker delivered certain wool to B., a spinner, to spin, and the clothworker in due time came with a horse to bring away the yarn, and there being no weighing beam on the premises of B., the clothworker went with his horse to C.'s house to get the yarn weighed, and C.'s landlord while the yarn was on the plaintiff's shoulders distrained it, together with the horse which was in C.'s stable, for the rent of C.'s house, it was clearly held that the distress of the yarn on the plaintiff's shoulders was unlawful, since that could be no more distrained than a net in a man's hand, or a horse on which he was riding. And although it was much doubted whether the distress of the horse was not lawful ; yet it was adjudged unlawful in favour of trade, because if the yarn had been weighed either in B.'s house, or in a public weighing-house, it had been unquestionably privileged for the encouragement of trade : and there-

(a) *Gilman v. Elton*, 3 Brod. and Bing. 75.

(e) *Francis v. Wyatt*, 3 Burr. 1498.
Robinson v. Walter, 3 Bulstr. 269.
R. v. Collins, Palm. 387, 374, 2 Roll. Rep. 345.

(b) 2 Saund. 287. A. 7.

(c) 3 Lev. 260. 2 Vent. 50. 2

Lutw. 1161.

(d) 2 Vern. 129. Prec. Ch. V.

(e) *Reade v. Burley*, Cro. Eliz. 549.

fore, since the design of bringing the horse and the yarn to the house of C. was merely in the way of trade, that design secured them from distress, while remaining there for that purpose. So they said a horse carrying corn to a mill, and tied to the mill during the grinding of the corn, is privileged for the same reason.

Again, where the tenant exercises the trade of a common carrier, the goods of his customers are exempt; and even where the tenant was not a common carrier, but was only in the habit after having brought cheese to London from the town of B., of carrying back the goods of all persons indifferently at a reasonable price, the court held that the exemption of carriers extended to his case. (f)

If a tenant in common lease his share to a stranger, he cannot distrain the beasts of his companion, or of any one who puts in his beasts by licence of his companion, on any part of the land for the rent of his own lessee. (g) But if the other tenant in common comes in as assignee of the lessor's moiety, the circumstance of the tenancy in common will not exempt his cattle on any part of the land from distress for the rent of that moiety. (h)

If a tenant at will sows the land and dies, or if the will is determined by the act of the landlord, the landlord cannot distrain the emblements for the rent of the next tenant in possession, although sold to a stranger. So if the corn while growing is seized and sold by the sheriff on an execution, and the tenant at will dies before it is ripe, the vendee from the sheriff is entitled to the same exemption for a reasonable time according to the practice of good husbandry. If the tenant at will determines the will by his own act, the case is different; and he is entitled to no privilege. (i)

If the goods of a stranger are distrained, and he has paid the rent to avoid the distress, his remedy is against the lessee in an action for money paid to the use of the lessee: and where there were three joint lessees, and two of them assigned to the third, but the landlord had consented to accept his sole liability,

(f) *Gisborne v. Hurst*, 1 Salk. 249.(h) *Snelgar v. Henstone*, Cro. Jac.(g) *Kempe v. Cory*, 2 Ventr. 227, 611.

283.

(i) *Eaton v. Southby*, Willes. 131.*Parslow v. Cripps*, Com. Rep. 504.

a stranger having put his goods on the premises with the permission of such third lessee, and having paid the rent to prevent a sale of them under the distress, was held entitled to his remedy against all three. (*k*)

If the goods of the tenant in possession are distrained for the rent of his landlord by the landlord paramount, and he pay the rent, it may in general be set off against any subsequent demand of rent by the immediate landlord. But in Ireland, by the stat. 56 Geo. III. c. 88. s. 16., in all cases where the entire rent due and payable from the occupying tenant to his immediate landlord shall have been paid, if in consequence of the fraud, malfeasance, and neglect of such landlord to pay and satisfy the rent due and owing to any superior landlord, the lands in the hands of such occupying tenant are distrained for such rent, the occupying tenant may recover the amount of costs and damages sustained thereby by civil bill in all cases where the same shall not exceed fifty pounds; and the amount of such costs and damages, when ascertained, may be tendered in payment of so much of the subsequent accruing rent as shall become due and payable, or shall be recovered by the usual process of execution.

Goods in the custody of the law are not distrainable; therefore, goods distrained damage feasant cannot be taken for rent, nor goods in the hands of a bailiff on any execution, nor goods seized by process at the suit of the king. (*l*)

In the case, however, of goods taken in execution by the sheriff the legislature has in some measure relieved landlords from the hardships under which they laboured. Before the stat. 8 Ann. c. 14. s. 1. (*m*) executions took place of all debts which were not specific liens on the land: but it being thought hard that landlords should not have something like a specific lien for rent actually due, this statute was passed, which entitles the landlord to be paid one year's rent, reckoning from the date of the execution, before the goods are applied to the purpose of the execution.

Under this statute it must be observed that the rent must be due at the time of the execution; therefore, if the sheriff takes in execution under a *fi. fa.* corn in the blade, and sell it before the rent is due, he is not liable to account to the landlord for rent

(*k*) *Exall v. Partridge*, 3 Esp. N. P. Co Litt. 47. a.

C. 8.

(*m*) Irish stat. 9 Ann. c. 8.

(*l*) *Eaton v. Southby*, Willes 131.

accruing due subsequent to the levy and sale, although the corn be not removed till long after a considerable portion of rent becomes due: but it was observed by Thompson, C. B. that there did not appear to be any reason why the landlord should not under such circumstances distrain. The execution was executed, and the goods of a stranger were remaining on the premises; his remedy, therefore, should have been by distress. (n) This dictum of C. B. Thompson, however, does not seem to be pronounced with his usual judgment, since such an evasion of the statute would nearly render it nugatory. Indeed, by the stat. 56 Geo. III. c. 50. the legislature seems to have precluded all doubt on the point. By the fifth section of that statute it is enacted that the sheriff or other officer in cases of execution, before any sale of any crops, or produce of any lands let to farm, shall be proceeded in, shall make due inquiry within the parish where such lands are situated, as to the name and residence of the landlord or owner of such lands. And by the next section it is further provided that in all cases, where the purchasers of such crop or produce shall have entered into an agreement with such sheriff to use and expend the same on the lands let to farm, according to the custom of the county or any written agreement between landlord and tenant, it shall not be lawful for the landlord to distrain for any rent on any corn, hay, straw, or other produce, which at the time of such sale, and the execution of such agreement entered into under that act, shall have been severed from the soil, and sold subject to such agreement by such sheriff or other officer. So that it seems to be taken for granted that such property could not be distrained before it was severed. In conformity also to this notion the court in the late case of *Peacock v. Purvis* have decided that growing corn, under such circumstances, can not be distrained, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe. (o)

The same act then extends the same protection to turnips drawn or growing, if sold according to the provisions of the act; and to horses, sheep, or any beasts, as well as to waggons, carts, or other implements of husbandry, the property of such purchasers, which may be employed on the land for the consumption of the produce

(n) *Gwilliam v. Barker*, 1 Price
274. *Smith v. Russell*, 3 Taunt. 400.

(o) 2 Brod. and B. 362.

according to the agreement entered into with the sheriff. The act, however, does not extend to any straw, turnips, or other articles which the tenant may remove from the farm consistently with any contract in writing.

By the seventh section of this act it is enacted that no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever which shall be newly sown under any crop of standing corn.

Although goods taken in execution are privileged from distress, yet if the sheriff's officer being in possession under an outlawry in a civil suit, make a distress for the landlord, and the outlawry is afterwards reversed; the proceedings are so void *ab initio* that the landlord may recover the proceeds of the sale in an action for money had and received against the sheriffs; for outlawry in civil actions is considered merely as civil process to compel the defendant's appearance. If the outlaw appears, pays all costs, puts in sufficient bail, and does every thing in his power to place the plaintiff in as good a condition as if the defendant had appeared at the regular time, the court will reverse the outlawry on motion without any writ of entry, and it will be as if there had been no record of outlawry. (p)

Before removal of goods under a sequestration out of the Court of Chancery, the landlord is entitled to one year's rent by the equity of the stat. 8 Ann. c. 14.: for his legal remedy of distress cannot be enforced against sequestrators any more than against receivers. (q)

A landlord may distrain even after assignment or sale by the assignees of a bankrupt tenant, if the goods are not removed: (r) but if the goods after sale have been removed, he can only come in *pro rata* under the commission. (s) So also where (t) a tenant became bankrupt, owing the landlord twelve years' rent, and the landlord proved his debt under the commis-

(p) *St. John's College v. Murcott*, 7 T. R. 259. *Ognell's case*, Cro. Eliz. 270. *Eyre v. Woodfine*, Cro. Eliz. 278. *Manville's case*, 13 Rep. 21.

(q) *Dixon v. Smith*, 1 Swanst. 457.

(r) *Ex parte Plummer*, 1 Atk. 103. *Ex parte Jacques*, and *ex parte Dil-*

lon, cited *ibid.* *Bradyll v. Ball*, 1 Bro. Ch. Ca. 427. *Ex parte Devine*, 1 Cook. B. L. 177. *Ex parte Grove*, *ibid.*

(s) *Ex parte Deschames*, 1 Atk. 103.

(t) *Ex parte Grove*, 1 Atk. 103.

sion, and permitted the assignees to sell the goods of the tenant to a third person who did not remove them, but took possession and lived on the premises as the bankrupt had done; Lord Hardwicke, after great consideration, confined the landlord to his remedy under the commission.

If a landlord distrains for rent, and afterwards proves the debt under the commission, it should seem that, since the late act of the 49th Geo. III. (u) he may be considered as having thereby made his election to take the benefit of the commission, and to have abandoned his remedy by distress. The point, however, has never been determined, and does not come within the precise words of the act.

If the landlord neglect to distrain, he is not entitled to a year's rent in preference to the other creditors by the equity of the stat. 8 Ann.; and indeed his remedy by distress seems to have been favoured in cases of bankruptcy, because no provision is made by that statute in case of bankruptcy. Where, (x) however, he was entitled to distrain for half a year's rent, and he became the purchaser of the goods from the assignees, it was held that he might retain half a year's rent out of the purchase money. If the tenant being threatened with a distress, pay rent which is due, the payment is protected, and the assignees cannot recover it in an action. (y)

When (z) the solicitors of the assignees of a bankrupt, whose goods were distrained, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained:" the expression "we as solicitors" having been considered sufficient to bind those personally who signed, the solicitors were held personally liable. (a)

It has been stated (b) that the mortgagee of a bankrupt's estate having paid the arrears of rent due to the landlord, shall not be preferred to the other creditors under the commission, unless he applies to the Court for an order to stand in the landlord's

(u) C. 121. s. 14. See 3 M. and S. 80.

(x) Taylor v. Buckley, 2 T. R. 602.

(y) Stevenson v. Wood, 5 Esp. N. P. C. 200.

(z) Burrell v. Jones, 3 R. & A. 47.

(a) See Appleton v. Binks, 5 East.

148.

(b) Anon. 1 Atk. 163.

place: but it does not appear how such an order could be made; because the mortgagee can be in no better situation than the landlord, and the landlord himself has no lien on the goods without actual distress. (c)

If an insolvent tenant conveys all his estate to a trustee for the benefit of his creditors, this will not avoid the landlord's right to distrain, for this is a weaker case than that of a bankrupt: where, (d) therefore, the creditors, after such an assignment, employed a broker to sell the goods, who accordingly advertised them for sale, and the landlord coming on the premises to distrain, the broker promised to pay the arrears on his desisting from the distress, the broker was held to have acted as bailiff to the landlord, and bound therefore to satisfy his debt first: neither was this a parol promise to pay the debt of another, within the statute of frauds; because, previous to the promise, the landlord had a legal pledge, and a prior lien to the creditors. So upon the same principle, if a trader, after an act of bankruptcy, pay money to a landlord, who was about to distrain, this cannot be recovered by the assignees; for the landlord has a legal lien independent of the bankruptcy; and it would be a fraud on his legal right to suppose that by accepting the rent instead of distraining he was in a worse situation. (e)

If several rents have accrued due, the landlord may distrain several times for such rents. But regularly at the common law, where there is an entire duty, or one rent only due, the landlord should distrain for the whole at one time: he is not, however, precluded from coming a second time, if he has not taken sufficient at first. (f) But if he distrains a second time for the same duty, it is incumbent on him to shew that at the time of making the first distress there was not sufficient on the premises, or that he had mistaken the value. (g) Too much strictness on this head, indeed, seems to be contrary to good policy, since it is for the advantage of the tenant that the landlord should not seize goods of any great value.

(c) 1 Cook. B. L. 180.

(d) *Williams v. Lepar*, 3 Burr. 1886. *Meux, q. t. v. Howell*, 4 East. 1.

(e) *Stevenson v. Wood*, 5 Esp. N. P. C. 200.

(f) See stat. 17 Cha. II. c. 7. s. 4. extended to Wales and the Counties Palatine, by stat. 19 Cha. II. c. 5. Irish stat. 7 W. III. c. 22. s. 3.

(g) *Moor*. 7. pl. 26. *Wallis v. Saville*, 2 Lutw. 1532.

Distresses, also, ought not to be excessive, but in proportion to the rent distrained for. (*h*) Thus, if two or three oxen be taken for twelve pence, it is unreasonable. So if the landlord distrain a horse or an ox for a small sum, when he might have taken a sheep or a swine, the distress is excessive: but if there be no other distress on the land, there the taking of an entire thing, though of never so great value, is not unreasonable. (*i*) Distress, however, for fealty, it is said, cannot be excessive, because it is a feudal obligation of paramount necessity, and consequently not to be estimated by any limited value. (*k*)

The common law allowed the party distraining to take more than the value of the rent, in order that the tenant might be induced more readily to redeem the goods by payment of rent. Neither was there any remedy at common law by action of trespass or otherwise for taking an excessive distress; because distress being originally a privilege given by law, the excess was considered a continuation, though unreasonably so, of a lawful act. (*l*) The stat. of Marlebridge, (*m*) however, at the same time that it directed that the distress should be reasonable, provided that persons taking unreasonable distresses should be severely amerced. The remedy, accordingly, which has been adopted for taking excessive distress, is by a special action on the case founded on the statute of Marlebridge. One case, (*n*) indeed, has occurred where trespass was held to lie; and that was where six ounces of gold and one hundred ounces of silver were taken for the sum of six shillings and eight pence; and the plaintiff had judgment, because in that case the excess appeared on the pleadings. It was a distress of gold and silver, which are of a known value, and even a measure of the value of other things: but it was there held that in all other cases of goods, and other things of arbitrary and uncertain value, the remedy must be by action on the case. Express malice is not necessary to support the action; neither is it for every trifling excess that the action can be brought: but the distress must be excessive to some disproportionate extent. (*o*)

(*h*) Stat. Marlebridge, 52 Hen. III. c. 4. 2 Inst. 106.

(*i*) 1 Roll. Abr. 674. 2 Inst. 107.

(*k*) 4 Rep. 8. 66.

(*l*) Lynne v. Moody, 2 Str. 851.
Hutchins v. Chambers, 1. Burr. 590.

Crowther v. Ramsbottom, 7 T. R. 654.

(*m*) *Supra*.

(*n*) Moir v. Munday, 28 Geo. II. B. R. cited 1. Burr. 590.

(*o*) Field v. Mitchell, 6 Esp. N. P. C. 71.

Although it is a general rule that the king shall not be bound by statutes which do not name him, this rule has several exceptions; and amongst the rest the statute of Marlebridge, which binds the king, though not named, because it was made to suppress a wrong. (p)

Since the distress in consideration of law is merely a pain to compel the payment of rent, the mere seizing the distress by the landlord does not alter the property. Although, therefore, the landlord may detain the distress, yet he must deposit the property in the custody of the law. He must secure the distress, either on the land or elsewhere, in some proper place for the preservation of the property seized. The place where the goods are deposited is called a pound, and the act of depositing the distress impounding. Pounds are either in the open air, or in some place sheltered from the weather, according to the nature of the distress taken: hence pounds are pounds overt or pounds covert.

Cattle, and such things as can receive no injury from the weather, may be impounded out of doors in a pound overt. Indeed, with respect to cattle, it is essential that they should be impounded in some place which is perfectly accessible to the owner, without obliging him to commit a trespass; for the owner must feed them, though impounded. If the landlord impound cattle in a pound covert, they must be sustained at his expense; and he is accountable for them if they die for want of food, or from any other cause: but if they die without default of the distrainer in a pound overt, the loss is the owner's, and the landlord may distrain again. (q) Furniture and other goods, which are likely to be injured by exposure, must be impounded in a pound covert.

These are the only distinctions relative to pounds of any importance. A pound overt need not be the common pound; for common pounds are only by custom, tenure, or agreement, among the inhabitants of a vill or manor, and not by common law: if, however, the distrainer makes use of the common pound, it is his pound; and he is answerable, if it is not capable of holding the distress, or the cattle receive any injury from the bad state in which it may be, since he might have had a safe pound elsewhere. The distress may now in all cases be impounded on

(p) 2 Inst. 142.

Stat. c. 27. Anon. 12 Mod. 297.

(q) Dy. 280. b. Hob. 61. Doct. and

the premises by virtue of the stat. 11 Geo. II. c. 19. s. 10.; (r) and, although no lock be put on the pound, it will be a sufficient impounding under this statute. (s)

Strictly speaking, every room in a house may be stripped, and all the furniture impounded in one room: but in general it is sufficient if the landlord seize some of the goods in the name of all. And if the furniture be kept in the same state in which the distrainer finds them, it will be a question for the jury whether this was not done with the concurrence of the tenant; and, if so, the landlord will not be precluded from the benefit of the distress. (t)

By the stat. 1 and 2 Ph. and M. c. 12. (u) it is enacted that no distress shall be driven out of the rape, hundred, wapentake, or laith, where such distress shall be taken, except to a pound overt in the same county, not exceeding three miles' distance from the place where the distress was taken. (v)

This statute does not restrain a party, if he take a distress in one county, from driving it six or more miles out of that county into another, if it do not exceed three miles from the hundred where it was taken, because a hundred may be in two counties. (x) So also, where lands in two different counties are demised at one entire rent, the landlord may distrain in either county, and chace the distress into the other: for this is but the continuance of the same taking. This however cannot be done, if the counties are not contiguous.

The stat. 1 and 2 Ph. and M. c. 12. further imposes a penalty of 5*l.* against every person offending against its provisions, by impounding the distress in several places: but it has been held that this relates to several offences, and not to several persons concerned in the same offence. (y)

Tender of the rent upon the land before or at the time of the distress makes, as we have observed, the original taking tortious. (z) Tender after the distress and before impounding

(r) Ireland, St. 15 Geo. II. c. 8.

(s) Firth v. Purvis, 5 T. R. 432.

Dod v. Monger, Cas. temp. Holt, 416.

(t) Washborn v. Black, Mich. Sit-
tings before Lord Mansfield, 1774.
Buller's MS.

(u) Irish stat. 10 Ch I. sess. 2. c.
25.

(v) See Gimbert v. Palah, 2 Str.
1272.

(x) Walter v. Rumbal, 1 Ld. Raym.
53.

(y) Partridge v. Naylor, Moor.
453.

(z) Crawley v. Kingswell, Hutt. 13.
Cro. Eliz. 813.

makes the detention, and not the taking, wrongful. Tender after the impounding comes too late, since the distress is then in the custody of the law which must determine the right. (a) Upon the same principle, where distress is taken without cause, the owner may rescue before impounding, but not after: for when the distress is impounded, it is in the custody of the law.

If a landlord, after having seized the goods in a house, quits possession of them without impounding them, a retaking will not be a rescous. (b) If the distress is rescued before impounding, the proper remedy of the landlord is by writ of rescous: but if the owner break the pound, the remedy at common law was by a writ *de parco fracto*. (c) The distrainer may also retake the cattle if the owner let them out, or if they escape by any other means: (d) but there is no pound breach, unless the cattle come out of the pound. (e)

By the stat. 2 W. and M. sess. 1. c. 5. s. 4. (f) upon any pound breach or rescous of goods or chattels distrained for rent, the persons grieved thereby are entitled to a special action on the case, and shall recover treble costs and damages. On the other hand, by the fifth section of the same statute, in case any such distress and sale as directed by that statute shall be made by colour of the act for rent pretended to be in arrear when none is due, the owner of the goods distrained and sold, his executor and administrators, may by action of trespass or on the case recover double the value of the goods distrained with full costs of suit.

In cases of pound breach it has been determined that in an action brought on this statute the costs are treble as well as the damages: for damages were given by the common law, and the statute only increases them. And since the statute of Gloucester gives costs wherever damages are recovered, the word *costs* in the stat. 2 W. and M. would be superfluous, unless treble costs were intended. (g)

It is no answer to an action under this statute for a pound breach that the rent and demand of the distrainer were tendered after impounding. (h) It was contended that although it was

(a) *Firth v. Purvis*, 5 T. R. 432.
The Six carpenters' case, 8 Rep. 147. a.

(b) *Dod v. Monger*, 6 Mod. 215.

(c) F. N. B. 228. 230.

(d) Co. Litt. 45. See *Always v. Broom*, 1 Ld. Raym. 83.

(e) *Winch*. 8.

(f) Irish stat. 7 Wm. III. c. 22. s. 6.

(g) *Lawson v. Story*, Skinn. 555.
Pilford's case, 10 Rep. 115. *Butterton v. Furber*, 1 Brod. and Bingham 517.

(h) *Firth v. Purvis*, 5 T. R. 432.

clear that a mere tender of rent was insufficient, yet the difficulty was obviated by tendering the demand of the plaintiff as well as his rent. On the part of the defendant it was proved that about an hour after the distress was made, while the plaintiff was yet on the premises, which were a public house, one of the defendants said to him, "Come to the bar with me, and I will pay you your rent and your demand;" and at the same time he pulled a purse out of his pocket which he held in his hand. To which the plaintiff answered, "No, I will not have the money; I will have the casks I have seized." Subsequent offers were made which the plaintiff refused, insisting on his treble damages. The court were inclined to think that the tender was not a good tender: but, at any rate, the tender after impounding the distress was insufficient.

In an action on the case for a rescue under this statute it has been held that the plaintiff does not bring himself within the statute, unless he shew in his declaration that the distress was appraised. (*k*)

In an action of trespass under the same statute the defendant could not formerly have proved under the general issue, that he entered to take a distress for a rent charge: but this evidence is now admissible by the stat. 11 Geo. II. c. 19. s. 21., (*l*) which enacts that in all actions of trespass or upon the case brought against any person entitled to rents or services of any kind, or his or her bailiff, relating to any entry by virtue of this act, or otherwise upon the premises chargeable with such rents or services, or relating to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall be lawful for the defendant in such action to plead the general issue, and give the special matter in evidence.

If the action be brought against a pound-keeper, he may prove that the goods were put into his custody as pound-keeper, and that as such he detained them: for a pound-keeper is obliged to take and keep whatever is brought to him. He receives no written authority, no warrant, as a gaoler does on the delivery of a prisoner into his custody, who must therefore state the warrant in his justification, but he is bound to impound the cattle at the peril of the person who brings them. (*m*)

(*k*) 1 *Ld. Raym.* 342.

(*m*) *Badkin v. Chancellor, Cowp.*

(*l*) *Irish stat.* 15 Geo. II. c. 8. s. 10. 476. 1 *Phill. Ev.* 180.

not deliver them, then the sheriff for default of those bailiffs shall cause them to be delivered."

By virtue of this act the sheriff may hold plea of replevin by plaint in the county court without writ, however large the value of the distress may be. (d) He may likewise out of court upon plaint so made to him command his bailiff either by parol or by precept in writing to replevy them, without waiting for the next county court: but in that case he must enter the plaint at the next county court, that it may appear on the rolls of the court. (e) By the stat. 1 and 2 Ph. and M. c. 12. s. 4., (f) the sheriff has the power of appointing four deputies, dwelling not above twelve miles from one another, who may make replevies in the same way as the sheriffs themselves may and ought to do, and the sheriff is liable to a penalty for not doing so.

The hustings court of the city of London being the county court of the county of the city of London, the sheriffs of London may grant replevins by plaint out of it; and the proper officer to execute process is the serjeant at mace. (g) But the steward of a hundred court, although such courts were originally derived out of the sheriff's tourn, has no power to grant replevins by plaint either in or out of court, since the sheriff derives his power of doing so from the statute of Marlebridge, and not from the common law. (h) This however concludes nothing as to such inferior courts as owe their jurisdiction to particular charters or to prescription, which presupposes such charters, where the extent of the jurisdiction and the course of proceeding may depend entirely on the terms in which the franchise was originally granted. That other inferior courts may have a prescriptive right to hold plea of replevin by plaint, though hundred courts cannot, seems to be admitted on all hands. (i)

Replevin must be brought against the person distraining, who according to his character of landlord or bailiff is denominated the avowant or person making conusance, a distinction arising

(d) 2 Inst. 139.

(e) *Ibid.*

(f) Irish Stat. 10 Ch. I. sess. 2. c. 25. s. 3. Irish Stat. 3 Geo. III. c. 9. s. 4.

(g) Anon. 12 Mod. 320.

(h) *Hallet v. Byrt*, 5 Mod. 248. 1

Lord Raym. 218. Salk. 580. Skinn. 674. Carth. 382.

(i) See Carth. 382. F.N.B. 70. B. Year-book, 29 Edw. III. 31. 12 Hen. VIII. 18. and see *Wilson v. Hobday*, 4 M. and S. 120.

only from the form of the plea in bar in replevin, which is called an avowry or conusance according to circumstances. (s)

The action must be brought by the owner of the goods: but the sheriff may justify the grant of a replevin without shewing the property to be in the party replevying. (t) If the plaintiff has at the time of the caption a general or special property, as bailee of the goods distrained, it is sufficient to support replevin. So also, although there may have been no property at the time of the caption, yet the present property, or a right to the immediate possession at the time of the replevin, is sufficient: the executors, therefore, of the person distrained are entitled to this action for goods taken in the lifetime of their testator, for the property passes to them. (u) So if the goods of a feme sole are taken, and she marries, the replevin should be in the name of her husband alone, because the goods are a gift to the husband by the marriage. (x) If beasts are taken in one county, and carried into another, the plaintiff may have his replevin in either; because it is a caption in every county where they are taken by the defendants.

A replevin does not lie against the king, nor where the king is a party, nor where the taking is in right of the king. If, therefore, such a writ should be issued, the sheriff should forbear to execute it after notice that the king is a party: because all the king's debts are of record, and consequently the cattle must have been seized for the king's debt by *levari facias*, which is a writ of execution. (y)

Whether the replevin be by writ or by plaint, the sheriff or other officer, before he grants the replevin, ought to take from the plaintiff proper securities to prosecute the suit, and to return the distress if a return should be adjudged against him. To prevent vexatious replevins in the case of a distress for rent, by the stat. 11 Geo. II. c. 19. s. 23., (z) all sheriffs and other officers, having authority to grant replevins, ought in every replevin of a distress for rent to take in their own names from the plaintiff and two responsible persons, as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one

(s) Wheedon v. Sugg, Cro. Jac. 372.

(x) F. N. B. 69. J. Doctr. Plac.

(t) Mills v. Davies, Com. Rep. 590. 315.

(u) Bro. Repl. 54. Arundell v.

(y) Gilb. Repl. 162.

Trevill, 1 Sid. 81. 1 Keb. 279. 319.

(z) Stat. 36 Geo. III. c. 38. Ir.

or more credible witnesses not interested in the goods or distress, which oath the person granting such distress is thereby authorized and required to administer,) and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, if a return should be awarded; and this bond must be taken before the deliverance of any distress. In former times the sheriff could only take pledges to prosecute, as in other actions, which pledges were only to answer the amercements to the king for false claim. And these soon became merely formal; so that, although the person distraining had judgment for a return, he frequently derived no benefit from his suit, because the tenant pending the suit had sold the goods replevied, and became insolvent. To remedy this inconvenience the statute Westm. II. (a) required the sheriff, before he executed the writ of replevin, to take from the plaintiff not only pledges to prosecute, but also to make a return if a return should be adjudged. And the statute further ordained that if the sheriff should take pledges in any other manner, he should be answerable for the price of the goods, and the person distraining should recover by writ from the sheriff as many cattle as goods. These two statutes are considered to be *in pari materia*: for the pledges required by the stat. of Westm. the second, and the sureties by the stat. 11 Geo. II. c. 19., are in effect the same. The stat. 11 Geo. II. c. 19. only enlarges the security to a given extent. In Ireland the stat. 8 Geo. I. c. 6. s. 5. and 6., gave all judges of inferior courts, having the power to grant replevins, a power also to take a bond with sufficient sureties, and of assigning it to the avowant, so as to sue upon it in his own name.

It is sufficient for the sheriff, on taking sureties in the bond that they be apparently responsible, for he is not bound to warrant their sufficiency; (b) neither is it requisite that such a bond should be taken *virtute officii* as in the case of bail bonds, under stat. 23 Hen. VI. c. 10., which makes bail bonds otherwise taken void. (c) If he neglect to take two sureties, the bond is not void *in toto*, but the single surety is liable to a moiety. (d)

(a) St. 13 Edw. I. c. 2.

Bull. N. P. 602.

(b) Hindal v. Blades, 1 Marsh. 27.

(c) Morgan v. Griffith, 7 Mod. 390.

5 Taunt. 225. Saunders v. Darling,

(d) Austen v. Howard, 7 Taunt. 22,

Form of replevin bond.

Know all men by these presents that we A. B. of &c. W. G. of &c., and P. S. of &c. are jointly and severally bound to W. P., Esq. sheriff of the county of in the sum of £. (*double the value of the cattle or goods distrained,*) of lawful money of Great Britain and Ireland, current in England, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns: for which payment, to be well and truly made, we bind ourselves and each and every of us in the whole, our and each and every of our heirs, executors, and administrators, firmly by these presents sealed with our seals, dated, &c.

The condition of this obligation is such that if the above bounden A. B. do appear at the next county court, to be holden for the county of at on the day of next, and do then and there prosecute his suit with effect and without delay against C. D., for the taking and unjustly detaining of his cattle, goods, and chattels, to wit (*here set forth the cattle or goods distrained*) and to make a return of the said cattle, goods, and chattels, if a return thereof shall be adjudged, that then this present obligation shall be void and of none effect, or else to be and remain in full force and virtue.

Sealed, &c.

Before the last-mentioned statute it was the practice, as it is still, in all cases except that of rent, to take a bond from the plaintiff himself to prosecute the suit with effect, and to return the goods, and to save harmless and indemnify the sheriff from the delivery of the beasts and other chattels: for the sheriff, being answerable for the sufficiency of the pledges, might take what security he pleased, since it was his own peril. Neither was he obliged to take more than one surety, if one were sufficient; for, although the word in the statute Westm. II. is in the plural "pledges;" yet, if one is sufficient, the intention of the statute is answered, and the defendant suffers no loss. (c)

No attachment lies against the sheriff from the court above

(c) *Mulso v. Sherer*, Fort. 330. *Hayn v. Bigg*, ib. 331.

for not taking a replevin bond, or granting a replevin; for the bond is in pursuance of the act, and not of the order of the court; and therefore, though no bond be taken, there is no contempt of court: (f) nor is it any abuse of the process of the court. (g)

The sheriff having taken pledges from the plaintiff in replevin, he ought forthwith to make deliverance of the goods or cattle distrained: but, if the distress was taken within a liberty having return of writs and impounded there, the sheriff ought first to issue his warrant to the bailiff of the liberty to make deliverance; and if the bailiff make no answer or do not obey the warrant, the statute of Marlebridge empowers the sheriff to enter into the liberty, and make deliverance himself. In this respect the statute has enlarged his power: for at common law the sheriff could not enter such a liberty without a writ of *non omittas*, the usual writ in all cases where bailiffs of liberties neglect to serve process: but in replevin this process was thought to be too dilatory. (h) By virtue also of the same statute, if the distress is taken out of the liberty but impounded in it, the sheriff may enter such liberty without any previous warrant to the bailiff, because the caption was in the county: and therefore the right to make deliverance ought to be in the officer within whose jurisdiction the cause of complaint first arose; and in these respects the law is the same whether the replevin be by writ or by plaint.

If the distress be drawn into a house, castle, or other strong hold (which was not uncommon in ancient times, when powerful men were in the habit of oppressing their weaker neighbours,) the sheriff or his bailiff after demand made for the delivery of the distress, may break open the house or castle to replevy it. The statute of Westm. I. expressly gives this power, although it seems to have been the common law before that time; for the common law only privileges a man's house for the protection of himself, his family, and his goods, from attachment in a civil action, at the suit of a private person; but it cannot protect him in the detention of goods and chattels of others unjustly taken. (i)

(f) *Twells v. Colville*, Willes 375.

(h) F. N. B. 68. 2 Ir. st. 139.

(g) *The King v. Lewis*, 2 T. R. 617.

(i) *Gilb. Repl.* 78. Stat. 3 Edw. I. c. 17.

No action of trespass will lie against officers acting under a precept for taking goods by virtue of a replevin, unless he who has the possession claims a property when the officers come to demand them, and they take them notwithstanding such claim. In replevin they are expressly commanded what to take in specie: but in writs of execution they are commanded in general to levy the goods of the party; and, therefore, it is at their peril if they take another's goods in execution; and, consequently, trespass will lie, although no property be claimed at the time of the levy. (k)

If the distress has been removed by the distrainer, the sheriff, where the proceedings are by plaint, may *ex officio* issue a precept in writing in the nature of a similar writ, where proceedings were by writ, called a *capias in withernam*; which is a species of *mesne* process to compel the deliverance of the distress by seizing and keeping the cattle or goods of the distrainer till he gave deliverance. In the case of replevin by writ the *capias in withernam* was a judicial writ, returnable into the King's Bench or Common Pleas; and thereby the sheriff was empowered to deliver the goods of the defendant to the plaintiff in lieu of his own till restitution of the distress: but the sheriff's precept is merely *vicontiel*; and, therefore, the property cannot be altered or delivered to the suitor by such authority, it being merely a pain to compel the execution of the judgment of the county court. No attachment lies upon it, because the *eloignment* is a contempt only of the process of the county court.

If the bailiff of a liberty return an *eloignment*, the sheriff must hold an inquest of office; and if the jury find an *eloignment*, the sheriff may then issue his precept to the bailiff: and, if the bailiff refuse to execute it, the party may have a special *capias in withernam* directed to the sheriff to do *withernam* and execution of the first judgment: but this writ is also only *vicontiel*; and, therefore, in that case also the goods are merely levied as a pain to compel deliverance. (l) But by the statute of Marlebridge (m) the sheriff has the power of fining the defendant, if he refuse to deliver the distress. If the bailiff return *nulla bona*, no *capias* lies: but the only remedy is by *alias et pluries ad infinitum*.

(k) Hallett v. Byrt, Carth. 381.

(m) 2 Inst. 150. Dalt. Sherr. 435.

(l) Gilb. Repl. 109.

There appears to be another writ in the case of plaints in the county court, which is the writ *de executione judicii* when the sheriff has not used due diligence to execute the writ of *willemam*. In this writ, though *willemam* be only meane process, the award of the county court is recited as a judgment. No attachment lies for contempt against the defendant, because the proceeding is by plaint; nor is the writ returnable into any of the king's courts; but since it is the king's writ, an attachment lies against the sheriff for disobedience to it. (n)

Since the action of replevin by writ has long since been disused, it is not necessary to detail the proceedings in that mode of action. (o) If the replevin is by plaint in the county court, either party may remove it either into the court of King's Bench or Common Pleas by a writ issuing out of Chancery, called a *recordari facias loquelam*, which commands the sheriff to record the proceedings, and when recorded to return the record into the court above. (p) If the replevin is by plaint in the court of any lord having jurisdiction in replevin, the writ to the sheriff is an *accedas ad curiam*. The more usual *accedas ad curiam* is a writ of false judgment: but this which is a species of *recordari* is also called an *accedas ad curiam*, because it commands the sheriff to go to the court of the lord with four men of his county, (in the writ called knights,) and there record the proceedings; whereas the common *recordari* commands him to record the proceedings in his own court. (q) Where the distress is taken in the manor of W., in one county, and driven to the castle of W. in another, where the court of the manor is held, the *accedas ad curiam* may be directed to the sheriff of the latter county. It is necessary that the sheriff should be directed to record the proceedings before they are removed, because, previously to such record being made of them, the plaint in the county court is not of record, since the court itself is not a court of record; and hence in the writ of *recordari* it is called *loquela*.

If the defendant remove the plaint, after the teste of the writ is inserted some cause why it should be removed; because the re-

(n) F. N. B. 20 A. Gilb. Repl. 99. Inst. 139.

Reg. Brev. 830.

(q) Thompson v. Jordan, 2 B. & P.

(o) See on this subject Gilb. Repl.

137. Woodcroft v. Kynaston, 9 Mod.

passim.

305.

(p) Reg. 85. F. N. B. 70 B. 2

moval is in delay of the plaint : but no such reason applies to the plaintiff ; therefore, he may remove without assigning any cause, since the removal is in his own delay, and no prejudice to the defendant. If, however, the plaint be in the lord's court, since the removal ousts the lord of his jurisdiction, both plaintiff and defendant on removal of the plaint must insert a cause after the teste of the writ. So if the plaint be in a court of ancient demesne, the plaint cannot be removed either by the plaintiff or defendant without shewing sufficient cause ; because it would change the condition of the soil to be impleaded in the king's court without such cause shewn. Such causes were formerly examined before the granting of the writ : but this practice appears now to be obsolete, and such writs issue of course. The cause of removal usually assigned is that the sheriff or his clerk, or the lord, as the case may be, is related to one of the parties, and the sheriff cannot return that the cause is not true. (r)

The *recordari* or *accedas ad curiam* directs the sheriff to have the record in the court above on a general return day, and to prefix the same day to the parties that they be then there to proceed in the action. The writ likewise commands the sheriff to return the *recordari* under the seal of the sheriff, and the seals of four suitors of the court in which the plaint is entered, who shall have been present when the plaint was recorded. In the old writ of *recordari* the terms used are *sub sigillo tuo et sigillis quatuor legalium militum*, which, strictly rendered, would be under the seals of four knights : but, since the abolition of military tenures, there are no persons answering the description of knights in the sheriff's court, except knights to serve in parliament for the shire. It is sufficient, therefore, if the record is returned into the court above, under the seals of four suitors of the county court. So in the *accedas ad curiam*, the sheriff is commanded to go to the lords' court ; and, taking with him four discreet and lawful knights in full court, to record the plaint ; and by this writ he must go in person, taking with him four men of his county : but it is not necessary they should be knights. (s)

The return of the *recordari* or *accedas ad curiam* should be made and filed by the party suing it out with the filacer of the

(r) 1 Tidd's Pr. 417. 7th edit.

(s) F. N. B. 40 B.

court above in two terms after it is returnable; or, on the filacer's certificate, the cursitor may issue a *procedendo*. It is a good return for the sheriff to say that after the receipt of the writ, and before the return thereof, no court was holden; and also that he required the lord to hold his court, and that he would not, so that he could not execute the same; and thereupon the justices shall award a *distringas* directed unto the sheriff to distrain the lord to hold his court, and sue out *alias*, &c. (1)

If the inferior court is a court of record, the proper mode of removing the pleas is by *certiorari*. (u) Anciently no other court but the Court of Chancery could grant a *certiorari* on a suggestion, where there was nothing before them; and the record when brought up, if wanted in another court, was sent there by *mittimus*: but it is now settled that a record may be removed into the King's Bench or Common Pleas, as well by *certiorari* out of that court, as by *certiorari* and *mittimus* out of Chancery. (x) The courts of King's Bench and Common Pleas have a general superintendence over all inferior courts of record: it is a consequence, therefore, of a court being an inferior court of record, that it is liable to a *certiorari* from the court of King's Bench or the court of Common Pleas.

No *certiorari*, however, will lie to the courts of counties palatine without a special ground, such as that the case strongly calls for a trial at bar; because the jurisdiction of counties palatine is not inferior to, but concurrent with, that of the court of King's Bench and Common Pleas. (y)

On the same principle the courts of great session in Wales, being the superior jurisdiction within the district, are not liable to a *certiorari* in civil cases; and there appears to be no exception from the rule. (z) The case of royal franchises is different. The jurisdiction of counties palatine and of the courts of great session are considered as created by prescription, or created and confirmed by act of parliament: (a) but franchises are only by charter from the king; and are, therefore, liable to the control of the King's Bench.

(1) F. N. B. 18 E.

Thea. Brev. 77.

(u) Woodcroft v. Kynaston, 9 Mod. 305.

(y) Zinck v. Langton, Dougl. 749.

(x) Butcher v. Aldsworth, Cro.

Chest. Cir. Comp. 25.

Eliz. 821. F. N. B. 244. A. 255. A.

(a) Gilb. Exec. 201.

A *certiorari* may, therefore, issue to the court of the Isle of Ely, (b) or to that of the cinque ports, or any other jurisdiction of a similar nature. (c)

Where a *certiorari* issues out of Chancery it is an original writ, and may be tested at any time in term or in vacation, and should be made returnable on a general return day: but, where it issues out of the King's Bench, it is a judicial writ, and should be tested in term time, and is usually made returnable on a day certain in court. If the writ be misdirected, or otherwise bad in point of law, the court will order it to be quashed if before them; or, if not returned, will grant a *supersedeas*: but if the parties to whom it is directed do not object to the informality, but return the writ, no such objection can be taken by third persons. (d)

A *certiorari* lies before judgment in all cases in which the courts of King's Bench or Common Pleas have jurisdiction: but it lies not in general where the debt or damages appear to be under forty shillings. Where the issue is joined within six weeks after the defendant's appearance, the practice is to deliver the writ of *certiorari* at any time before the jury are sworn: if it is delivered later the inferior court, if it have jurisdiction, may proceed without paying any attention to it, by virtue of the stat. 43 Eliz. c. 5. If the issue be not joined within six weeks after the defendant's appearance, no such writ can be received by the officers of inferior courts, unless delivered before issue or demurrer joined. (e)

On a *certiorari* the record itself is returned in the condition in which it was when the writ came into court: yet, since there can be no continuance from the inferior to the superior court, the proceedings above must be *de novo*. (e)

On *recordari* nothing but the plaint is removed, though issue has been joined in the court below, because the proceedings of an inferior court, can only be brought under the notice in a superior court of record by writ of false judgment, where the inferior court is not of record. Hence a plaint may be removed by *recordari*, although the plea be discontinued in the court below. So also the plaint is well removed from the county court, though the *recordari* bear

(b) *Cross v. Smith*, 1 Salk. 148.

318. *Daniel v. Phillips*, 4 T. R. 499.

(c) Lill. Pr. Reg. 253, 257.

(e) Gilb. Exec. 200.

(d) *Woodcroft v. Kynaston*, 2 Atk.

date before the plaint is entered : but if it be removed out of the lord's court, it is said that if the *accedas ad curiam* bear date before entry of the plaint, it is bad. (f)

If the plaint is once removed out of the county court, it cannot be remanded ; for, after the plaint is removed, the instrument of removal has done its office, and the court will hold plea on the plaint, and not on the writ of removal ; therefore, the plaint is well removed by *certiorari*, where it ought to have been by *recordari*. So if one plaint is removed in place of another, or there is a variance between the plaint and the writ, it is notwithstanding a good removal. (g) In ancient demesne, however, the whole plea is on the cause of removal, because it would alter the condition of the soil to be impleaded in the king's court without sufficient cause : the plea therefore may be remanded, and the plaintiff be nonsuit on such a *recordari*. (h)

If a *recordari* is sent to a court of record to remove a replevin there depending, they may proceed, and not obey the writ : but if they do obey the writ, they cannot proceed upon the plaint because they have sent the plaint away from them ; neither can the court above hold plea of it, because it comes to them without a proper warrant. But in that case the parties may sue a writ to the justices of the superior court to proceed upon the record "*quod coram vobis residet*." (i) If the record be filed in the Court of King's Bench upon a *certiorari*, it never can be remanded : therefore a *procedendo* to the inferior court must be moved for before the filing of the record. After the cause has once been remanded, it cannot afterwards be staid before judgment. (k)

All these writs of removal, whether sued out to courts of record or otherwise, suspend the power of the judge in the inferior court instantly ; and, if the officer proceeds, he is liable to an attachment, and the proceedings are void as *coram non judice*. (l) Neither can he refuse to obey the writ under the pretence of not

(f) Gilb. Repl. 155.

(g) Arden v. Hargreave, Cro. Eliz. 548. F. N. B. 69. M. a. Contra, Moor. 30.

(h) Gilb. Repl. 111.

(i) Gilb. Repl. 153.

(k) Fazakerley v. Baldo, 1 Salk. 352.

Stat. 21 Jam. I. c. 23.

(l) Bro. Cause de Rem. pl. 48. Cross v. Smith, 1 Salk. 148. Zinck v. Langton, Dougl. 749. Ellis v. Johnson, Cro. Car. 261. Copping v. Fulford, Tho. Jones, 209. Dorrington v. Edwin, Skinn. 244.

being paid his fees, because in that case he has his proper remedy by action. (m) So the delivery of a *recordari* after interlocutory and before final judgment is a step to all farther proceedings in the county court. (n)

Without entering into the proceedings in this action fully, it may be useful to observe that after removal of the plaint into the court above the proceedings are *de novo*, and the plaintiff must declare as in all other actions. As between landlord and tenant the usual plea in bar is styled an avowry or conusance. The avowry or conusance acknowledges the distress taken : but avoids the injustice of the caption, and sets forth a good cause for taking the distress in order to have it returned ; so that in replevin both parties are actors, the plaintiff to have damages for the taking of his goods, and the avowant or person making conusance to a return of the distress and damages.

The statute 21 Hen. VIII. c. 19., after reciting that leases were often made to persons unknown, enables landlords to avow without naming any person in certain as tenant. To an avowry upon this statute, *non tenet* cannot be pleaded generally : but all other pleas may be pleaded. (o)

The statute 32 Hen. VIII. c. 2. s. 4.; which enacts that no person shall make avowry or conusance for any rent, &c. or allege seisin of any ancestor above forty years, &c., has been held only to relate to very lord and very tenant, where the avowant was obliged to allege a seisin, by force of some ancient statute of limitations ; and this was only when the seisin was material, and of such force that it could not be avoided in avowry, though it was by encroachment ; but, in case of a reservation or grant of rent by deed, there the deed is the title, and there can be no incroachment, and the seisin is not material. (p)

In avowries for rent at the common law much nicety was required, from which the plaintiff against the justice of the case frequently derived great advantage ; for in avowries at common law the defendant was obliged to shew that he or some person from whom the reversion came to him was seized, the

(m) *Bevan v. Prothesk*, 2 Burr. 1152.

(n) *Bevan v. Prothesk*, 2 Burr. 1151.

(o) *Paramor v. Chapman*, Cro. Jac. 127.

(p) *Foster's case*, 8 Rep. 65. a. *Falkner v. Bellingham*, Cro. Car. 80. §14.

quantity of estate of which he was seized, and that he made a lease for life, or years, or at will; and, lastly, the descent or grant of the reversion to the avowant. (*q*) So if the tenant for years had leased the estate for a less term at a certain rent, and distrained for it, it was incumbent on him to shew the commencement of his estate, by laying the fee in some person who granted the term, and then deducing it down to himself, which was often a difficult and impracticable thing, especially in the case of a long term of years which had been assigned to a great number of persons. But now defendants in replevin, by the statute 11 Geo. II. c. 19. s. 22, (*r*) may make avowry or conusance for rent generally, by stating that the plaintiff or other tenant of the land, whereon the distress was made, enjoyed the same under a grant or demise at a certain rent during the time wherein the rent distrained for accrued, and averring that such rent was then and still is due; without setting forth the grant, demise, or title, of such landlord or lessor: and if the plaintiff shall become nonsuit, discontinue, or have judgment, the defendant shall have double costs. It has been said, however, that in some cases it may still be proper to avow at common law; as, for instance, where the parties agree to try the title under the replevin, in order to give the plaintiff an opportunity to traverse, and so go to trial on some particular point.

This act does not extend to avowries for a rent-charge, (*s*) nor to a rent under a canal act in satisfaction for damages, and charged on the rates: but only to a rent directly reserved by a landlord on his grant on a demise of land theretofore made. (*t*)

In one case (*u*) it was contended that the statute 11 Geo. II. by permitting general avowries in the case of distress for rent had precluded the plaintiff from inspecting deeds connected with and essential to his own case, because before that statute the avowant must have pleaded such deeds with a *profert in curia*, and the plaintiff would have been entitled to oyer: but the court said this

(*q*) Lib. Plac. 264. Clift. Entr.
640. Dally v. Silly, 1 Bro. P. C.
Toml. 525.

(*r*) Irish stat. 25 Geo. II. c. 13. s. 4.
See also the Irish stat. 9 Geo. II. c. 13.
s. 4.

(*s*) Bulpit v. Clarke, 1 N. R. 56.

(*t*) Leominster Canal v. Cowell, 1
B. & P. 213.

(*u*) Brown v. Rose, 6 Taunt. 124.
283.

circumstance would not prevent the plaintiff from compelling the production of the deed, if the justice of the case required it.

The statute 11 Geo. II. has made no difference in avowries where the demise is by indenture: for even at common law, where the lease was by indenture, it was sufficient for the avowant to state, that he was possessed and leased to the plaintiff by deed indented, because the indenture operated by estoppel between the parties: so that the statute has only benefited landlords where the demise is by parol, or by any deed or writing not indented. (x)

It is sufficient in making conusance to say generally that the defendant is bailiff without shewing his authority; and the subsequent agreement of the landlord will be an authority. (y) So where one of several co-heirs in gavelkind avowed in his own right, and as bailiff of the others, it was held that he needed not to aver an authority, for he might distrain without an actual authority. (a) The being bailiff, however, is traversable for whatever cause the distress is taken. (z)

Where (b) by indenture between A., B., C., bailiffs, D., E., F., aldermen, (with the assent of the burgesses) of M., of the one part, and J. S. of the other part, lands were demised by the said bailiffs, aldermen, and burgesses to J. S. for years, and the deed was executed by the parties, but not sealed with the corporation seal; J. S. having paid rent to the bailiffs, as chief officers of the borough, it was held that their servant might make conusance as under a demise from the corporation, notwithstanding a notice from the aldermen, one of whom was a party to the indenture, to pay rent to them; for the payment of rent to the bailiffs admitted a tenancy from year to year. The bailiffs appeared to be the acting officers of the borough, and the aldermen were improperly introduced into the lease.

In an avowry (c) under the stat. 32 Hen. VIII. c. 37. s. 1. the defendant avowed as administrator, stating "that A. for the space of two years and a half next before and ending on the 25th December,

(x) Gilb. Repl. 188.

233.

(y) Bro. Trav. 3. Lamb v. Mills, 4 Mod. 376. Trevilian v. Pine, 11 Mod. 112. Bro. Bailiff, 2. Manby v. Long, 3 Lev. 107.

(a) Leigh v. Shepperd, 2 Brod. & B. 465.

(b) Wood v. Tate, 2 N. R. 247.

(c) Meriton v. Gilbee, 8 Taunt. 159.

(z) Trevilian v. Pine, *supra*. *Contra* Harrison v. Britton, 1 Lord Raym.

See ante 599.

1809, and from thence until and at the time of the death of the intestate, held and enjoyed the premises as tenant thereof to the intestate by virtue of a certain demise, &c. (without stating the estate of the tenant): that the intestate for and during all the time aforesaid was seized in his demesne as of fee of the said premises, and that he died being so seized on, &c., and that administration was duly granted to the defendant, and then avowed the taking on the premises in which, &c. the same being charged with the payment of the said rent, and chargeable to the distress of the said intestate, and before and at the same time when, &c. continuing, remaining, and being in the possession of the plaintiff only, by and from the said A. as his tenant thereof, and justly, &c." There was a second avowry similar to the above, stating the yearly rent to be of a different value. To the first avowry the plaintiff pleaded first *non tenuit*, and secondly *riens in arriere*; and there were two similar pleas to the second. It was contended that this was not a case within the statute; because the rent was only reserved on a lease for years: but the court held the avowries to be good in form, because it did not appear by what species of holding the tenant held; there being one possible case in which the administratrix might not avow, and the pleas in bar not shewing that, the avowries must be taken to be good. Onslow, Serjeant, made another objection, namely, that it did not appear that the tenant distrained on was seized in demesne. But Burrough, J. said that "demesne" in the statute meant only occupation. (d)

So in a later case, where (e) in replevin the defendant made connu-
sance as bailiff of an executor under the stat. 32 Hen. VIII. c. 37.
for arrears of rent incurred in the lifetime of the testator, it was
held that such an avowry need not state the title of the testator, or
shew that the executor was entitled to distrain under that statute,
and that at all events it could not be objected to after verdict.
Dallas, C. J. "This case must be governed by *Meriton v. Gil-
bee*, (f) from which the court see no reason to depart."

Avowries may be made at several times for several rents;
therefore, an avowry for a latter rent will be no discharge of a
former. (g)

(d) See *ante*, 599. *et seq.*

(f) *Supra*.

(e) *Martin v. Burton*, 3 B. Moor.
608.

(g) *Palmer v. Stratwick*, 1 Keb. 113.
Palmer v. Strange, 1 Lev. 43. S. C.

If in avowry the lessor avows only for part of the half-year's rent, without shewing how the other is satisfied, it is ill; because, where a certain rent is due, it must be demanded at once. (g) But the avowant may abate his own avowry for part of the rent distrained before judgment; although he cannot do so after judgment, because the judgment is according to the avowry which is for the entire rent. (h)

By the stat. 4 Ann. c. 16. s. 4. (i) the plaintiff in replevin may plead several pleas in bar to the avowry. He may in one plea deny the tenancy or demise, and in another that any part of the rent was in arrear, concluding each to the country. (k) *Riens in arriere* indeed in replevin admits the title of the defendant as stated in the declaration: but since this statute has permitted pleading several matters, such an admission must be understood only of the plea of *riens in arriere* when pleaded alone; for the plaintiff cannot be supposed to admit that which he at the same time denies, if both pleas stand. The course is, that if the jury find the first issue for the plaintiff, the second is immaterial; and the jury may be discharged; or if any verdict is entered, it must be for the plaintiff. (l) The plaintiff may likewise plead *non tenet* and infancy together. (m)

In an action of replevin the landlord's title under which the tenant has gained possession cannot be disputed, although the tenant is prepared with evidence to shew that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person: therefore, *nil habuit* cannot be pleaded, nor can evidence be given which amounts to it. A disclaimer of the title of the lord by the tenant was considered by the ancient law as a breach of fealty: but, in modern times, the rule may be considered as depending on an equitable principle, namely, that the tenant shall never use as an advantage against the landlord what the act and confidence of the landlord has intrusted to him, namely, the possession and the tenure of the land. In replevin, debt, covenant, and the more modern action for

(g) *Johnson v. Baynes*, Cas. temp. Holt. 555.

(h) *Richards v. Cornforth*, Com. 42. Lev. 5. Mod. 353. 2 Salk. 586. 1 Lord Raym. 256.

(i) Irish stat. 6 Ann. c. 10.

(k) Com. Dig. 3. K. 16; 20. Horn v. Lewin, 1 Ld. Raym. 641. 1 Saund. 103. b.

(l) See *Comey v. Diggon*, 2 B. & A. 546.

(m) *Wilson v. Ames*, 1 Marsh. 74.

use and occupation, the question on the part of the landlord is demise or no demise, to which the answer on the part of the tenant is either a traverse of the tenancy, or no rent in arrear; for, as a landlord may have a right to let without a legal title, so the denial of the title would be no answer to his claim of rent upon the demise. It may, indeed, sometimes happen that the tenant, in consequence of having taken his land from a landlord holding under a bad title, may be compelled to pay his rent twice over: but the mischief at most is only temporary, and the law gives him a remedy in an action against the wrongful taker. (n)

Under either of the pleas before mentioned, namely, the plea of *non tenuit* and *riens in arriere* which last is in the nature of a general issue to the action, (o) the plaintiff may shew that the landlord's title has ceased, although he retains possession; (p) or that it has been recovered from him by a judgment at law, and that he has no right to turn him out of possession, or that the lessor has assigned or granted over the reversion. (q)

In replevin proof of payment of rent to the defendant is *prima facie* evidence that he is owner of the land. Therefore, where the tenant, coming into possession under an assignment, had notice that the lease was held under a particular person, to whom the former tenant had paid rent, the title could not be disputed in replevin. (r) So, on the other hand, if the defendant claims by a derivative title, and has never received rent, and there is no demise by indenture, the title will be put in issue, by a traverse of the tenancy, and a general plea in bar. (s) But where (t) the estate belonged to A., to whom the plaintiff had been tenant, and afterwards he paid rent to the defendant who had extended the land by an elegit, and a moiety had been delivered to him by metes and bounds, it was held that the tenant having paid rent to him, in ignorance of the true state of the case, was not irretrievably his tenant, but that the tenant might rebut the title of the avowant by shewing that he paid the rent under circumstances

(n) See *Parry v. House*, 1 Holt. bottom, 3 M. & S. 516.

N. P. R. 489.

(r) *Bullpit v. Clerk*, 1 N. R. 56.

(o) See *Warner v. Theobald*, Cowp. 588. *Sullivan v. Stradling*, 2 Wils. 208.

(s) *Rogers v. Pitcher*, 6 Taunt. 202.

(p) *Burne v. Richardson*, 4 Taunt. 720.

Williams v. Bartholomew, 1 B. and P. 326.

(q) *England d. Syburn v. Slade*, 4 T. R. 682. *Doe d. Jackson v. Rams-*

(t) *Johnson v. Mason*, 1 Esp. N.P.C. 89.

which no longer entitled the avowant; and such evidence may be given on the issue of *non tenuit*.

If tender be pleaded, it must be pleaded to have been made to the person for whose benefit the distress was made, and not to his bailiff, unless the distress was taken by the bailiff in the absence of his lord, and the bailiff is averred to be the usual receiver; and the proof must agree with the averment. (u) A plea of a former distress for the same rent, without adding that the rent was thereby satisfied, is bad. (x)

Suspension of the rent by eviction or expulsion must be specially pleaded; and, although in every plea of eviction there is an averment that the lessor had not a perfect title when he demised, yet such a plea seems not to be sufficient, unless it be added that the lessee was in consequence ousted. (y)

A plea of distress for the same duty on other lands chargeable should be pleaded in abatement, *viz.* that a former replevin was depending; or, if it is determined, then, levied by distress, and so *riens in arriere*. (z)

Where the defendant admits the tenancy, and that part of the rent is in arrear, he may plead *riens in arriere* as to part, and tender as to the residue: (a) but no set-off can be pleaded to an avowry for rent, because the statutes of set-off do not apply to distresses. The payment, however, of the ground rent to the landlord paramount may be pleaded, because it is not a cross demand, but a demand superior to the improved rent. Besides it is a payment in respect of occupation, and may be enforced by distress; and therefore it is clearly distinguishable from a voluntary payment to charge another against his consent. (b) On the same principle it is a good plea to an avowry for rent that, before the lessor had any thing in the land, a termor granted an annuity or rent charge with power of distress; that the annuity was in arrear, and that the grantee demanded it, threatening a distress;

(u) Gilb. Repl. 89.

3 K. 20.

(x) Hudd v. Ravenor, 2 Brod. and B. 662. Lingham v. Warren, 2 Brod. and B. 36. Lear v. Edmonds, 1 B. and A. 157.

(b) Sapsford v. Fletcher, 4 T. R. 511. See Absalom v. Knight, Barnes 456. 4to. Bull. N. P. 181. Graham v. Frayne, H. 24. Geo. II. B. R., and Laycock v. Tuffnell, 27 Geo. III. B. R.

(y) Cowp. 242.

(z) Scilly v. Arundel, Comb. 375.

(a) Clift. Entr. 646. Com. Dig. Pl.

in consequence of which the plaintiff paid the amount of the rent, then due to the avowant, to the grantee of the annuity. (c) The only difference between this case and the other is, that here the land only was shewn to be liable; in the other the immediate lessor was also personally liable: but this distinction was held not to be material. The land was subject to a burthen in the hands of the defendant himself; and, it being so subject, he leased it to the plaintiff, as if it were free from such prior burthen, under a rent payable to himself. The liability of the land would have been no plea, because it would have amounted to a plea of *nil habuit*: but when the annuitant threatened to exercise his right of distress, the two facts together constituted a complete defence.

So an allegation of the payment of the landtax and paving-rates is a good plea in bar to an avowry for rent, because the tenant is empowered by the act of parliament to make the deduction out of the rent accruing: but the payment for any prior period cannot be so pleaded, because that would be in the nature of set-off. (d) These matters cannot be given in evidence under the general plea, of no rent in arrear.

The plaintiff in replevin may pay the rent into court, for which the defendant avows, it being a certain demand: but the avowry is not abated thereby, even though the defendant take it out of court: for the issue is not whether the money was paid or not, but whether the caption was legal or not; and, if it was, the defendant is entitled to damages. (e) On the same principle proof of a smaller sum than that mentioned in the avowry, if issue be taken upon it, will not deprive the avowant of a verdict: for the issue is whether *any* rent is in arrear. (f)

An avowry for an increased rent for every acre which should be converted into tillage is supported by the evidence of a lease with a covenant to pay such increased rent. It is sufficient by the stat. 11 Geo. II. to state the general effect of the demise; and the variance here is immaterial. (g)

Where the defendant is a bailiff, and a tender has been pleaded, and a subsequent demand and refusal replied, the demand must

(c) *Taylor v. Zamira*, 6 Taunt. 524. 689. *Vernon v. Wynne*, 1 H. Bl. 74.

(d) *Andrew v. Hancock*, 1 Brod. and Bingham. 27. *Stables v. Parsons*, 8

B. and A. 516. (f) *Cobb v. Bryan*, 3 B. and P. 248.

(g) *Boulton v. Clark*, 2 H. Bl. 553.

(e) *Horn v. Lewin*, 1 Lord Raym.

have been made by, and the refusal have been to, the defendant himself; for, being but a bailiff, he cannot delegate his authority. (h)

The party under whom a defendant makes censure is not an admissible witness for the defendant: (i) but he may be called by the plaintiff, although his declarations alone are not evidence against the defendant. (j)

The court will not stay proceedings in replevin at the suit of the plaintiff, unless upon payment of all the rent in arrear, and costs; though the arrears should have been tendered before replevin brought, with costs up to that time. (k) Neither will it stay proceedings at the request of the defendant, without the payment of all the costs of the action and of the distress and replevin; nor, without the delivery of the replevin bond by the defendant to be cancelled. If the plaintiff assign any special damage, he may elect to proceed for it, as in other actions. (l)

If the suit abates, the plaintiff is not liable to costs: (m) neither is the defendant entitled to a return if the plaintiff die before avowry, because the defendant must shew a just caption by his avowry before a return can be made; but he may distrain again. (n)

If judgment be given for the plaintiff on demurrer, it is not final: but a writ of inquiry must issue to ascertain the damages; and on the return of this inquisition the judgment for the plaintiff is final. If there is a verdict for the plaintiff, no writ of inquiry is necessary; but the jury impanelled on the issue may ascertain the damages sustained by the caption and detention, and also the costs of suit. (o) Actions of replevin are within the stat. 21 Jam. I. c. 16., and must be brought within six years.

By the stat. 17 Ch. II. c. 7. s. 2., (p) wherever the plaintiff shall be nonsuited before issue joined in any suit of replevin depending in any of the King's Courts at Westminster, (q) the

(h) *Pinnis v. Greville*, 6 Esp. N. P. C.

P. 603.

94.

(i) *Golding v. Nias*, 5 Esp. N. P. C.

(m) *Smith v. Walgrave*, Com. 182.

373.

(j) *Hart v. Horn*, 2 Campb. N. P. C.

and *Smith v. Walker*, 2 Lord Raym.

92.

788.

(k) *Hopkins v. Sprole*, 1 B. and P.

(n) *Gutfield v. Corney*, 2 Wils. 83.

388.

(o) *Gilb. Repl.* 323.

(l) *Banks v. Brand*, 3 M. and S.

(p) Irish stat. 7 Wm. III. c. 23.

525. *Hodgkinson v. Salbourn*, 3 B. &

(q) This act has been extended to

Wales and the counties Palatine, by the stat. 19 Ch. II. c. 5.

defendant making a suggestion in the nature of an avowry or conusance for rent, to ascertain to the court the cause of the distress, the court shall award a writ of inquiry touching the value of the distress; and thereupon notice of fifteen days shall be given of the sitting of such inquiry to the plaintiff, or his attorney in court. And upon the return of such inquisition the defendant shall have judgment to recover the arrears of rent, in case the goods or cattle distrained shall amount to that value; and in case they shall not amount to the value, then so much as the value of the distress shall amount to, with full costs of suit; and he shall have execution thereon by *fi. fa.* or elegit, or otherwise as the case may require. And in case the plaintiff shall be nonsuit after conusance or avowry made, and issue joined, or if the verdict be given against the plaintiff, then the jury impanelled to try the issue shall inquire of the arrears, and of the value of the distress; and, therefore, the defendant shall have judgment and execution as in the last case. If judgment be given on demurrer for the avowant or person making conusance, the court shall award a writ of inquiry to inquire of the value of the distress, (without mentioning any thing of the arrears,) and upon the return thereof judgment shall be given for the arrears alleged to be due on such avowry, if the distress amounts to that value; and, if not, then for the value of the distress. Where the value of the cattle distrained shall not be found of the full value of the arrears, the party, his executors and administrators, may distrain from time to time for the residue. Where judgment is given on demurrer for the avowant, fifteen days' notice of the writ of inquiry should be given as in the case of a nonsuit; for these writs being both by force of the statute, which prescribes a notice of a certain length in one case, it may reasonably be applied to the other. (r) If both parties consent that the court shall assess the damages, either on demurrer or non-pros, without a jury, such a judgment whether for the plaintiff or defendant will be good, *quia consensus tollit errorem.* (s)

Although the statute is general, *viz.* that where the plaintiff is nonsuit before issue joined, the defendant making a suggestion in the nature of an avowry or conusance, the court shall award a writ of inquiry; yet if the plaintiff be non-prossed for want of a

(r) *Burton v. Hickey*, 1 Marsh. 444.(s) *Gilb. Repl.* 227.

plea in bar to the avowry, it does not appear to be necessary in that case to make any suggestion, because the avowry itself has done all which the statute requires, namely, ascertained the cause of distress.

The defendant in replevin is not entitled by the stat. 14 Geo. II. c. 17. to move for judgment, as in the case of a nonsuit, on the plaintiff's neglect to bring on an issue to trial, because in replevin both parties are actors; and in this respect the practice of the courts of K. B. and C. B. are the same. (t)

At the time of passing the statute 17 Ch. II. (u) in all cases of distress, when judgment was given in replevin for the avowant or person making conusance on demurrer or non-pros, the form was to award a return of the cattle or goods distrained to the defendant; and if the distress was for rent, customs, service, or damage feasant, an inquiry of damages and costs was also awarded, pursuant to the statutes 7 Hen. VIII. c. 4., and stat. 21 Hen. VIII. c. 19. The defendant accordingly sued out upon the judgment a writ called a writ *de retorno habendo* to have a return of the cattle, generally in the same writ with the writ of inquiry, or sometimes in separate writs; and upon the return of such writ or writs, final judgment was entered up for the defendant to recover as well the damages and costs assessed by the jury, as the costs of increase adjudged by the court; and the defendant might enforce the payment by *ca. sa.* or *fi. fa.* So also if a verdict was given for the defendant upon an issue, he was entitled to the writ *de retorno habendo*: but there was no occasion for a writ of inquiry, since the jury might assess the damages on the verdict. In an entry, however, under the stat. 17 Ch. II., a writ *de retorno habendo* does not appear to be necessary, although the awarding of a return cannot be considered erroneous, because the statute does not alter the judgment at common law, but only gives a further remedy. (x)

Where the plaintiff was nonsuited after issue joined, the jury impanelled to try the cause does not seem to have had the power

(t) c. 7. *supra*.

(u) Shortridge v. Hiern, 5 T.R. 400.

(x) Cooper v. Sherbrook, 2 Wils.

116. Baker v. Lade, Carth. 258. See

Mounson v. Redshaw, 1 Saund. 186.
and Poole v. Longueville, 2 Saund.
286.

at common law, to assess the damages for the defendant, but the judgment was in form the same as on non-pros or demurrer; the stat. 17 Ch. II. may therefore be considered as having introduced this remedy for the benefit of the defendant.

Where a verdict is given for the defendant, or the plaintiff is non-suited after issue joined, since the jury impanelled to try the issue ought to make the necessary inquiries as to rent and damages, any omission on their part cannot be supplied by a writ of inquiry, if the judgment has been entered up under the stat. 17 Chs. II., since such a judgment is in its nature final: but the defendant in such cases is not debarred of his judgment at common law. Therefore, after error brought, the court will permit the defendant to amend and enter up judgment *pro retorno habendo* at the common law. (y)

Formerly, if the distress was eloigned, so that the sheriff could not restore them according to the exigence of the writ *de retorno habendo*, upon the sheriff's returning *averia elongata*, a *capias in withernam* might issue: and, if the plaintiff had no cattle, upon the return of that writ the defendant might then sue out a *scire facias* against the pledges; and if no cause was shewn, a writ issued to take the cattle of the pledges. If the pledges had no cattle, *scire facias* might issue against the sheriff himself. (z) But these proceedings did not at all prevent the defendant from recovering his damages and costs under the statutes of Hen. VIII. before mentioned. (a) In such cases, a less circuitous practice has been adopted in modern times; for now, upon the return of "*elongata*" to the writ of *retorno habendo*, it is not necessary to sue out a *capias in withernam* against the plaintiff, or *scire facias* against the pledges, or against the sheriff: but in case the sheriff has taken no pledges at all, or such as are insufficient, the defendant may bring an action on the case against the sheriff. (b)

Wherever judgment is given for the avowant or person making

(y) *Sheape v. Culpepper*, 1 Lev. 56. *Trevors v. Michelborne*, Hutt. 255. *Herbert v. Waters*, 1 Salk. 205. 77. 3 Nels. Abr. 207.
Kinaston v. The Mayor of Shrewsbury, (z) 2 Inst. 340. *Combes v. Cole*, Cas. temp. Hardwicks, 207. *Sheet*
v. Coffin, 5 Burr. 2520. *Ross v. Morgan*, 3 T. R. 349. temp. Hardw. 352. See last page.
 (b) *Rouse v. Bateman*, 20 Vin. Abr. 299.

(a) *Dorrington v. Edwin*, 3 Mod.

cessance after verdict or upon demurrer at the common law, the terms are that the defendant shall have a return of the goods or chattels irreplevisable. But before the statute 17 Cha. II., if the plaintiff had been nonsuited, the defendant, although he was then entitled to a return, could not have a return irreplevisable; for the plaintiff might have, in such cases, as many replevins as he pleased. This was very vexatious, inasmuch as the defendant by having the distress taken from him was not likely to recover the rent, since he wanted the pledge to compel the payment of it. The remedy given by the statute of Westminster II. was by a writ of second deliverance, which was a judicial writ, issuing out of the record of the replevin on which the nonsuit was. The proceeding was nearly the same as in replevin; and if the plaintiff was again nonsuited, or failed in any way, the judgment then was for a return irreplevisable. This writ of second deliverance was a supersedeas to the writ *de retorno habendo*, but not to the writ of inquiry, under the statute. This statute, therefore, may be said to have taken away the writ of second deliverance, where the distress is for rent; because the writ of second deliverance could be of little use if the defendant might still proceed for the whole rent, or at least for the value of the distress. (c) Where, (d) however, the plaintiff was nonsuit for want of a declaration on which the defendant made a suggestion, and took out a writ of inquiry on the stat. 17 Cha. II., and the plaintiff moved to set it aside, the court said that since the stat. 17 Cha. II., had taken away the writ of second deliverance, the plaintiff was remediless, unless assisted by the court. The defendant, therefore, was made to shew cause why he should not accept a declaration on payment of costs.

Where the plaintiff is nonsuited before issue joined, the defendant has his election whether he will proceed by writ *de retorno habendo*, or by writ of inquiry under the stat. 17 Cha. II., although a return be awarded by the Court. (e)

It seems formerly to have been a question whether where in replevin part is found for the plaintiff, and part for the defendant,

(c) Playter v. Sheering, 1 Ventr. 64. Gilb. Repl. 246.

Bull. N. P. 58. Barnes 427. Cooper v. Sherbrook, 2 Wils. 118. Keef v. Weldon, M. & Geo. II. B. R. Ireland.

(d) Playter v. Sheering, *supra*.

(e) Turner v. Turner, 2 Brod. and Bing. 107.

the jury can assess damages and costs for the plaintiff, because the avowant is in the nature of a plaintiff; and some part of the issue being found for him, plainly shews that he had a right to take some though not all the goods. There is some contradiction in the books: but it seems to be the better opinion that if the defendant be found to be entitled to any part of the rent, no damages and costs can be assessed for the plaintiff. (f)

The statute of Gloucester gives the plaintiff the costs of his writ, and the stat. 21 Hen. VIII. c. 19. s. 3. (g) puts an avowant in the same condition as a plaintiff by the statute of Gloucester. The term "costs of the writ" means costs of the action. But if the avowant, after trial and verdict for the plaintiff, obtains judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs on the pleadings subsequent to the pleas in bar, because he should have demurred; and consequently all the costs of the trial were occasioned by his own default. (h)

The stat. 4 Ann. c. 16., (i) which gives the plaintiff leave to plead several matters in bar, provides, by the 5th section, that if any such matter on a demurrer joined be deemed insufficient, costs shall be given at the discretion of the court; or if a verdict shall be given in like manner, unless the judge who tried the issue shall certify that the tenant or plaintiff in replevin had a probable cause to plead such matter, which upon the said issue shall be found against him. The word "avowant" seems to have been omitted by accident, where it is said, "if a verdict shall be found for the plaintiff or demandant;" for a certificate could not be said to be given to excuse the plaintiff from paying costs, unless the defendant would otherwise be entitled to them. Where, (j) therefore, some issues were found for the plaintiff, which entitled him to judgment, and some for the defendant, it was held that the defendant should have the costs of the issues found for him out of the general costs of the verdict, unless the judge should certify. And the defendant is entitled not only to the

(f) 1 Brownl. 173. Parsons v. Denton, 2 Roll. Rep. 37. Cro. Jac. 473. Nels. Lutw. 375.

(g) Irish stat. 33 Hen. VIII. st. 1. c. 7.

(h) Da Costa v. Clarke, 2 B. and P. 376.

(i) Irish stat. 6 Ann. c. 10.

(j) Dodd v. Jodderell, 2 T. R. 235.

costs of the pleadings; but also to such costs of the trial as relate to the issues on which he has succeeded. (*l*)

A defendant in replevin residing out of the jurisdiction is liable to be called upon to give security for costs: (*m*) but the court will not make a rule that the person in whose right a defendant makes consuance shall enter into a rule to pay costs, because he might have been made a party. (*n*)

If the judgment for the plaintiff be reversed, such new judgment must be given as the court would have given before; which cannot be for the avowant, unless upon the merits of the avowry; and if that be bad, it must be *nihil capiat per billam*. (*n*)

Where a judgment is for the avowant, and affirmed on writ of error, the avowant is not entitled by force of the statute 3 Hen. VII. c. 10. to interest on the sum recovered; for that is confined to judgments recovered by plaintiffs below, and affirmed on error. (*o*) Neither is such defendant in error entitled to his costs on the statutes 8 and 9 Will. III. c. 11. s. 2. that being confined to judgments for defendants on demurrer.

If goods are replevied, the distrainor has no lien on them; therefore, if they are eloiigned or disposed of, the only remedy is at law against the sheriff, or on the replevin bond. The stat. 11 Geo. II. c. 19., which introduced the replevin bond, as it is now usually taken, further provided that the sheriff or other officer, taking such bond, should at the request and costs of the avowant, or person making consuance, assign such bond to the avowant, or person making consuance, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without stamp, provided the assignment so indorsed be duly stamped before action brought thereon: and if the bond be forfeited, the avowant, or person making consuance, may bring an action and recover thereupon in his own name; and the court where such action shall be brought may by a rule of the same court give such relief to the parties, upon such bond, as may be agreeable to justice; and such rule shall have the nature and effect of a defeasance to such bond.

(*) *Vollum v. Simpson*, 2, B. & P. 368. *Cook v. Green*, 1 Marsh. 234.

(l) *Selby v. Grutchley*, 1 Brod. and Bingh. 508.

(m) *Long v. Kelsall*, Comb. 333.

(n) *Bret v. Bagill*, Comb. 398.

(o) *Cone v. Bowles*, 4 Mod. 7, *Golding v. Dias*, 10 East. 2.

Both the avowant and the person making consuance may take an assignment of the replevin bond, and may sue jointly. (p) The assignment also, if made by a person acting in the sheriff's office with the seal of office, is a good assignment. (q)

The condition of the replevin bond is not satisfied by a prosecution of the suit in the county court: but the plaint, if removed by *recordari*, must be prosecuted in the superior court; and a return made if so adjudged. (r) But the avowant may sue in the superior court, as assignee of the sheriff, though the plaint be not removed out of the county court. Indeed, before it could be otherwise held, it must be shewn that the county court can hold plea of debt for 100*l.* and more. (s)

A defendant in replevin is entitled to an assignment, although he has not made avowry or consuance, if the plaintiff by not appearing in the county court has not given him an opportunity: but he is not entitled to such an assignment on the plaintiff's neglect to declare at the next county court, if he himself have not appeared to the summons. If he obtain an assignment, and bring an action, the court will stay proceedings on affidavit that a writ of *recordari* has been sued out; and the costs will be ordered to abide the event of the proceedings on the *recordari*. (t)

If the plaintiff is nonsuited in replevin, the defendant is not bound to take the earliest opportunity to prosecute his writ of *retorno habendo*; and he may distrain the same goods for rent subsequently accrued, previously to his executing the writ *de retorno habendo*, without waiving his right of action on the replevin bond; neither is he bound to have his damages assessed by the jury under the stat. 17 Ch. II. (u) So, if the plaintiff be nonprossed for want of a plea in bar, the avowant may sue the sureties without executing a writ of enquiry; neither are the sureties in the case of nonpross or nonsuit discharged by the execution of a writ of inquiry, under the stat. 17 Ch. II., and a judgment thereon for the avowant. (v)

(p) *Phillips v. Price*, 3 M. and S. 180:

(q) *Middleton v. Sandford*, 4 Campb. N. P. R. 36.

(r) *Gwillim v. Holbrook*, 1 H. and P. 410: See *Anon.* Fort. 309: *Nicholls v. Newman*, Fort. 361. *Vaughan v. Norris*, Cas. temp. Hardw. 137. *Chap-*

man v. Butler, Carth. 248. *Lane v. Foulk*, ComB. 228.

(s) *Dias v. Freeman*, 5 T. R. 104. *Phillips v. Price*, 3 M. and S. 180.

(t) *Staf v. Price*, 3 Price 17.

(u) *Hedford v. Alger*, 1 T. R. 278.

(v) *Whitman v. Fox*, 2 Wils. 41. *Nicholls v. Newman*, Fort. 361.

The obtaining an injunction out of the court of Chancery will not forfeit the bond; for the plaintiff cannot be said to discontinue the suit till nonsuit, *retraxit*, or some other act which puts an end to it. (x) And it has been held (y) at law, that the defendant does not in all cases discharge the sureties by giving time to the principal. An action was brought in C. B. upon a replevin bond which the defendant had executed as surety for a tenant of the plaintiff on a distress for rent made on the nineteenth of January, 1814. On the third of March, 1814, at the assizes in Suffolk, in another replevin cause between the same parties, the tenant gave a cognovit, subject to a reference, which comprehending all differences respecting rent, embraced the replevin, which was the occasion of the defendant's bond in the present action: but it was expressly agreed between the parties that nothing in the agreement contained should discharge the sureties in the replevin of the nineteenth of January, 1814; and that no proceedings should be had in that replevin cause pending the reference. This reference and agreement were entered into without the knowledge of the surety. The arbitrators awarded in July, 1814, that the tenant should pay the rent on the eighth of August, 1814; and the plaintiff, under the cognovit, on the seventh of September, entered up judgment and took in execution the stock of the tenant; and, that being insufficient, arrested him for the residue. He afterwards absconded, leaving the surety liable on this bond. The case came before the court on a motion to set aside the proceedings in the action, on the ground that the plaintiff, by the reference having given time to the principal, had discharged thereby the surety. Gibbs, C. J.—“The principle was first adopted in the court of Chancery, that if a creditor gives time of payment to his principal debtor without giving notice to the surety, the surety no longer remains liable. The courts of law in late days have acted upon the same principle, and applied it to the case of bail: for, when the plaintiff has given time to the principal, the bail are put in a new situation; for as the plaintiff could not during that time take the defendant, so neither can the bail whose right grows out of the plaintiff's. But what is the present case? Sureties in replevin cannot at any time take the goods of the plaintiff, and restore

(x) *The Duke of Ormond v. Brierly*,
12 Mod. 380.

(y) *Moore v. Bowmaker*, 6 Taunt.
379.

them to the avowant. As to the other part of the case, the agreement between the plaintiff and defendant to refer resembles a rule to refer the quantum of damages; and there the bail are answerable for the amount: this has no resemblance to the case where bail are prevented from rendering the principal, and therefore there is no ground for the application."

The surety afterwards applied to the court of Exchequer for an injunction, which was granted; (x) the court observing that the question lay in a very narrow compass. "The bond was of course conditioned that the principal should prosecute his writ with effect against the landlord. The action of replevin is in fact entered: but afterwards an agreement is entered into between the landlord and the tenant, without the concurrence of the surety, whereby the tenant is precluded from proceeding according to the condition. By that agreement a mode is chalked out for ascertaining and arranging their mutual demands; and in the mean time, all proceedings are to be stayed: so that the tenant is restrained by the act of the landlord from doing that which his surety has engaged he shall do. It turns out, indeed, that the same parties afterwards agree that the action shall proceed so as to give the landlord his original remedy against the surety: but that is what we cannot suffer after what has been done. When the agreement of reference was executed, the bond as against the surety was *functus officio*."

Notwithstanding this decision of the court of Exchequer, the case (a) came on again in another shape before the court of Common Pleas. The plaintiff declared as assignee of the replevin bond, and stated the facts in the usual way; to which the defendant pleaded several pleas in bar, in the third of which the above mentioned facts were stated. The plaintiff demurred; and after the demurrer had been argued, Gibbs, C. J. delivered the opinion of the court, which, with reference to the point in question, was as follows: "It is difficult to see any one of these facts, which is not greatly in favour of the defendant, in the replevin bond; for the agreement authorizes a stay of the action of replevin, and the tenant is empowered to deduct from the rent sums which he could not otherwise deduct. All this is in favour of the tenant and his sureties. It is said it delays the proceedings, and so is a

(x) *Bowmaker v. Moor*, 3 Price 214. (a) *Moor v. Bowmaker*, 7 Taunt. 97.

prejudice to the surety : but delay of proceedings is no prejudice to a defendant. This has no similitude to the case of the bail on an arrest. The reason why delay in that case discharges them is that it impedes the bail of the remedy which they have by rendering the principal : but there is no ground here to say that the plaintiff has delayed the defendant of any remedy by reason of his not having pursued his own remedy with the utmost diligence against the principal."

The same case (*b*) then again came before the court of Exchequer, which granted a perpetual injunction against the defendant in equity to restrain him from suing on the replevin bond, on the ground that the circumstances affected the conscience of the defendant in equity ; because the suit was, in point of fact, delayed, and the surety placed in a different situation by the delay, which might have been prejudicial to him, whether it actually was so or not.

Upon this case it may be observed that in the first judgment of the court of Common Pleas the rule seems to have been narrowed too much by confining it to the case of bail ; and that the doctrine of the court of Exchequer, whether it be considered as legal or equitable, is more consonant to equity, considered as synonymous with natural and universal justice. On the second occasion the court of Common Pleas appears to have rested their decision partly on the ground that the surety had received no actual injury : but it is justly observed by Richards, C. B. that this could make no difference so long as there was a possibility that the defendant might be injured. The injunction in each case seems to have been granted upon the original equity administered before courts of law had sanctioned the same doctrine ; and, although it might appear to admit of a question whether, after courts of law have adopted an equitable rule, which thence forward is established as a rule of law, it is a sound ground of decision in equity to recur to the old rule of equity in any case except where courts of law subvert in principle such adopted rule of law : yet it appears to be clearly settled that the adoption of an equitable principle, such as the present, by a court of law will not exclude the concurrent jurisdiction of courts of equity. (*c*)

(*b*) *Bowmaker v. Moore*, 7 Price 323.

(*c*) Per Lord Eldon, *Hawkshaw v. Parkins*, 2 Swanst. Ch. Ca. 546.

The sureties in a replevin bond are not discharged by the execution of a writ of enquiry, under the stat. 17 Ch. II., and a judgment thereon for the avowant to recover the arrear of rent found, and a sum for his costs and damages. (d) The point came on in the form of a plea in the case cited, which was demurred to. The condition of the bond was in the usual form. Dallas, C. J., in delivering the opinion of the court, said, "we think the condition of the bond was broken: by the plaintiff in replevin becoming nonsuit, he has not prosecuted his suit with effect. Although it appears by the declaration that a return of the cattle, goods, and chattels, was awarded; yet we think the avowant had his election, whether he would proceed by a writ *de retorno habendo*, or by the course which he has pursued, namely, the issuing of a writ of inquiry, under the stat. 17 Ch. II. (e) If the court were to decide that this plea was a good bar to the plaintiff's action, it would follow that the avowant, or person making cognisance for rent, would not derive from the sureties in the replevin bond the benefit which was intended to be given them by the stat. 11 Geo. II. (f) It is quite clear from the language of this act that the legislature meant to give the avowant, or person making cognisance, a further and additional security; and to place him in a better situation than he was under the law as it then stood. But this act has another wise provision; for the framers of the act, fearing that this indulgence might be used vexatiously, have introduced this clause, namely, that the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond. If the plea had stated that an execution had issued on the judgment, and the sum recovered had been levied and paid to the avowant before this action was commenced, the case would have come before us in a very different shape. It is sufficient to say that this is not alleged. We think the action is well brought, and that the plea is no bar to it. If the action shall be enforced so as to work injustice, the defendant has a plain remedy under the stat. 11 Geo. II. by an application to this court for relief."

(d) *Turner v. Turner*, 9 Brod. and Bing. 107.

(e) c. 7. s. 2.

(f) c. 19. s. 23.

Debt may be brought on the replevin bond against one of the sureties, and in the *detinet* only; on the principle that a man may complain of part of his grievance, and not of the whole. He may, therefore, abridge his demand; and declare in the *detinet* instead of both the *debet* and *detinet*. (g)

The two sureties together are only liable to the amount of the penalty, and the costs of suit on the bond; (h) and no interest can be given on the affirmance of the judgment. (i) At the common law the pledges were liable only to the amercement *pro falso clamore*: but now, the security being taken by bond, the court will not relieve against the penalty without payment of the costs by the surety. (i)

If the sureties are insufficient, an action on the case lies for the assignee of the replevin bond. (k) The high sheriff, undersheriff, and replevin clerk, appointed under the stat. 1 and 2 Philip and Mary, c. 12., are all answerable in replevin for the insufficiency of the pledges; and a rule may be made absolute against all three to shew cause why they should not pay the defendant the damages recovered by him: (l) but the superior court has no jurisdiction to order the officer of the inferior court, by whom the pledges were taken, to pay the defendant the costs recovered, if no cause was in court (m) when the replevin bond was taken. The remedy against the officer below is by action. (n) Some evidence must be given of the insufficiency of the pledges: but very slight evidence is sufficient to throw the burthen of proof on the sheriff. (o)

The sheriff, however, is only liable to the extent of double the value of the goods distrained; for though the stat. Westminster the second directs that the sheriff shall be answerable for the price of the beasts if the pledges are insufficient; yet, since the stat. 11 Geo. II. has enlarged the security to a given extent, it has been held not unreasonable that the sheriff's liability should be limited by analogy to that statute. (p) In the action against

(g) *Wilson v. Hobday*, 4 M. and S. 120.

(h) *Hafford v. Alger*, 1 Taunt. 218.

(i) *Anon.* 4 Taunt. 30.

(k) *Page v. Kamer*, 1 B. & P. 378.

(l) *Richards v. Acton*, 2 Bl. 1220.
Rous v. Patterson, 16 Vin. Abr. 399.

(m) *Qu. What court?*

(n) *Tesscyman v. Gildart*, 1 N. R. 292.

(o) *Saunders v. Darling*, Bull. N. P. 60.

(p) *Evans v. Brander*, 2 H. Bl. 547. overruling *Concanen v. Leth-*

the sheriff the sureties on the bond may be witnesses to prove their own sufficiency. (q)

Although the assignee of the replevin bond is the proper person to bring the action; yet if he be the bailiff only, the lessor, with his consent, may bring the action in his name; and in that case the bailiff will have no power to release the action without the lessor's privity. (r)

In the case of *Ansten v. Howard* (s) the question was whether where the sheriff takes a replevin bond with one surety only, and after a judgment in replevin for a return, the return fails, upon which the distrainor recovers against the sheriff, the sheriff can recover against the single surety more than a moiety of the sum composed of the rent, and the costs of the replevin suit. The court thought that the sheriff ought not to recover more; and the parties compromised the matter according to the advice of the court, the defendant paying one moiety.

The rights between party and party are paramount to the rights between one party and his attorney. Therefore, where the plaintiff in replevin became insolvent after obtaining a verdict on a variance, the court having permitted the avowant to amend and try his cause again, paying the costs of the former trial into court, directed such costs to be a fund for his rent in derogation of the lien of the plaintiff's attorney. (t)

As the distrainor could not use or work the distress, much less could he sell it at the common law. (u) In the king's case, however, from the peculiar nature of the writ, which is a *levari facias*, the sheriff was bound to sell the distress levied at a just and reasonable price, in order that the owner might not be aggrieved. (x)

The stat. 2 W. and M. sess. 1. c. 5., which enables the distrainor to sell the distress, when fully stated, is to the following effect: that if the tenant or owner of the goods distrained shall not within five days next after such distress taken, and notice thereof (and of the cause of such taking) left at the chief mansion house, or other most notorious place on the premises charged

bridge, 2 H. Bl. 36. See also *Yea v. Lethbridge*, 4 T. R. 433.

(q) 1 Saund. 193. c.

(r) *Hickey v. Burt*, 7 Taunt. 48.

(s) 7 Taunt. 327.

(t) *Brown v. Sayce*, 4 Taunt. 330.

(u) Co. Litt. 47. b.

(x) Madd. Hist. Exch. 670.

with the rent distrained for, replevy the same with sufficient security to be given to the sheriff according to law, then in such case after such distress and notice as aforesaid, and expiration of the said five days, the person distraining may and shall with the sheriff or undersheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken, (who are by the same act required to be aiding and assisting therein) cause the goods and chattels so distrained to be appraised by sworn appraisers, (whom such sheriff, undersheriff, or constable, are thereby empowered to swear to appraise the same truly and according to the best of their understandings) and after such appraisement shall and may lawfully sell the goods and chattels distrained for the best price which can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus, if any, in the hands of the said sheriff, undersheriff, or constable, for the owner's use.

The five days allowed by this statute before a distress can be sold are inclusive of the day of sale. (y) But if the goods distrained are only appraised at the end of the five days, and not sold, this does not take away the tenant's right of replevying, although the goods are removed from the premises. (z)

The stat. 2 W. and M. does not apply to the distress of standing corn; for that was not distrainable till the stat. 11 Geo. II. c. 19. s. 8. (a) made it so. By that statute the landlord after having seized any crops of corn, grass, hops, roots, fruits, pulse, or other product, as a distress for rent, may cut, gather, make, cure, carry, and lay up the same, when ripe, in the barns or other proper place on the premises, or in case there shall be no barn or proper place on the premises, then in any other place which the lessor shall hire or procure, and as near as may be to the premises; and in convenient time he may appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and

(y) *Wallace v. King*, 1 H. Bl. 13.

(a) Extended to Ireland by the stat.

(z) *Jacob v. King*, 1 Marsh. 135. 56 Geo. III. c. 98. s. 15.

5 Taunt. 451.

chattels may be seized, distrained, and disposed of: the appraisement thereof to be taken, when cut, gathered, cured, and made, and not before. It is also thereby provided that notice of the place where the goods so distrained shall be lodged or deposited shall, within one week after the lodging or depositing thereof in such place, be given to such lessee or tenant, or left at his or her last place of abode. If after any distress so taken of corn or other growing produce, and at any time before the same shall be ripe, and cut, cured, or gathered, the tenant or lessee, his or her executors, administrators, or assigns, shall pay or cause to be paid to the lessor or landlord, or his bailiff, the whole rent in arrear, with the full costs and charges of making such distress, then the distress shall cease, and the corn or other growing produce shall be delivered to the lessee or his tenant, his or her executors.

Where (b) a distress was made of standing corn on Saturday the 29th of August, and the sale took place on the Tuesday following, it was contended that the lessee might maintain an action on the case against the landlord under the stat. 2 W. and M. sess. 1. c. 5. s. 2. for selling the distress before five days, or a reasonable time. The jury assessed the damages in respect of the growing crops, which were sold before they were ripe: but the court held that the sale was altogether void; for the corn could not be sold before an appraisement, and no appraisement could be made before the corn was ripe. The plaintiff had therefore sustained no legal damage; and, consequently, had no ground of action in respect of it.

The convenient time mentioned by the stat. 11 Geo. II. c. 19. s. 8. cannot be measured by any reference to the five days allowed for replevy by the stat. 2 W. and M., at least as far as respects growing corn and other produce; for the next section of the same statute supposes that notice of the place where such distress is lodged may not be given to the tenant within the five days.

Where land lies in different but contiguous hundreds, and a distress is levied in both hundreds, and impounded in one of them, the constable of either hundred may administer the oath to the appraisers. So if the distress be taken in one of such hun-

(b) *Owen v. Legh*, 3 B. and A. 470.

drove, and driven to the other, and there impounded, the chasing is the continuance of the taking; and the constable of the hundred where the distress was first found may administer the oath in the other hundred in which he has no authority. (c)

Personal notice of the sale is sufficient, since notice is the thing required; and the owner of the goods to whom notice has been given cannot object that notice has not been given to the tenant. (d) Also a sale by the distrainer or his bailiff, though neither sheriff, under-sheriff, or constable, be present at the sale, for the price at which they have been appraised, is good; (e) for it will be intended to be the best price till the contrary is shewn. But the person who makes the distress cannot be one of the sworn appraisers. (f)

Before the stat. 11 Geo. II. c. 19. s. 19. the person distraining was frequently deemed a trespasser *ab initio*, in consequence of some subsequent irregularity or tortious act committed in the course of the distress, although he might have had legal cause to distrain in the first instance for rent arrear; and in an action brought against him as such, the plaintiff was entitled to recover the full value of the rent for which such distresses were taken. To remedy which injustice the stat. 11 Geo. II. provided that the distrainer should not be so deemed a trespasser *ab initio*, by reason of any subsequent irregularity: but gave the party aggrieved by any such unlawful act or irregularity an action of trespass or on the case, at his election, for the special damage, and no more, together with full costs of suit in case he should recover in such action. The tenant, however, cannot recover if tender is made before action brought. (g) By s. 21. of the same statute (h) the general issue may be pleaded by the defendant in such cases; and, if the plaintiff be nonsuited, the defendant is entitled to double costs.

With respect to the action of the case mentioned in the statute, it must be understood of such actions only as are consistent with the remedy intended. Therefore, although trover be an action

(c) *Walter v. Rumbal*, 1 Ld. Raym. 58.

(d) *Ibid.*

(e) *Ibid.*

(f) *Westwood v. Cowne*, 1 Stark. N. P. C. 172.

(g) See sect. 20.

(h) Irish stat. 15 Geo. II. c. 8. s. 9. : but no Irish statute appears to have adopted the 19th and 20th sections of the English statute.

on the case, that form of action will not lie for goods irregularly sold under a distress, because it tends to place the landlord in the situation of a trespasser *ab initio*; which the statute expressly declared that he should not be considered. (i)

Although the statute gives the party his election, it must be understood with some qualification; for it cannot be considered as giving an option of those two remedies in every case of an unlawful act, whether the action is adapted to the nature of that act or not, by general law. He cannot therefore maintain trespass, for instance, against the distrainer for an excessive distress, or for detaining in his hands the proceeds of the goods sold beyond the rent and costs. The option therefore must be understood according to the subject matter; that is, trespass where the action of trespass is the proper remedy; and case, where case would be so on general principles of law.

Where (j) one having entered under a warrant of distress, continued in possession fifteen days, during the four last of which he was removing the goods sold under the distress, although it was held that he was a trespasser for continuing on the premises after the time allowed by law, and disturbing the plaintiff in possession of the premises; yet Lord Ellenborough, C. J. said he should have had great doubt in this case, if one of the trespasses charged and proved had not been the taking and removing the goods from the premises after the time allowed by law, and the case had rested on the mere personal remaining of the party on the premises: for then the case would have resembled the case of one who enters by leave of the owner, and does not quit at the time, or after the purpose is satisfied to which his leave extended; who, according to the doctrine in the Six Carpenters' case, (k) is not a trespasser by merely not doing what he should do. Le Blanc and Bayley, JJ. held, on the contrary, that the mere act of remaining on the premises after the time allowed by law made the defendant a trespasser. It seems however to be settled, that for such an irregularity as omitting an appraisement trespass will not lie. (l) But trespass will lie against a landlord, who in making a distress for rent turned the plaintiff's family out of

(i) *Wallace v. King*, 1 H. Bl. 13.

(k) 8 Rep. 146.

(j) *Winterborne v. Morgan*, 11 East.

(l) *Messing v. Kemble*, 2 Campb.

possession; and kept possession of the premises in which he impounded the distress. (m)

If the landlord does not distrain himself, he may authorize any other person in the following manner, or to the like effect :

I do hereby authorize you, E. F. of, &c. in the county of, &c. yeoman, to distrain the goods and chattels of A. B. of, &c., in the said county, husbandman, in the dwelling house (or "in the farm, lands, and premises,") situate in the said county, for l. being years rent due to me for the same, at last : and to proceed thereon for the recovery of the said rent as the law directs, dated the day of

Yours, &c.

To. E. F. (the bailiff).

Then either the landlord himself, or the person empowered by him as aforesaid, must go upon the premises, and seize the distress or some part, in the name of the whole ; and make an inventory thereof as follows.

An inventory of the several goods and chattels distrained by me C. D. (or "E. F. the bailiff") the day of in the year of our Lord in the dwelling house, (*describing the premises*) of A. B. situate at in the county (if the distress be made by a bailiff say, "by the authority and on the behalf of C. D.") for the sum of l. being years rent due to me, (or "to the said C. D.") at last.

In the dwelling house.

In the parlour.—One table, &c. (*setting out the goods.*)

In the cowhouse.—Six cows, &c.

This inventory is liable to a stamp duty of 2s. 6d. by stat. 37 Geo. III. c. 90. s. 1.

A copy of this inventory, together with a copy of the following notice of distress, should be left with the tenant, or at his dwelling house.

Notice.

To Mr. A. B.

Take notice that I have this day distrained (or "that as bailiff to C. D. your landlord, I have this day distrained")

(m) *Etherton v. Popplewell*, 1 East. 139. *Astlett v. Vincent*, 2 Ld. Raym. 1482.

on the premises abovementioned, the several goods and chattels specified in the above inventory for the sum of £. being years rent due to me (or "to the said C. D.") at last for the said premises: and that, unless you pay the said rent with the charges of distraining for the same within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand the day of in the year of our Lord .

Witness R. S.

C. D.

The like notice for growing crops under the stat. 11 Geo. II. c. 19. s. 8.

Mr. A. B.

Take notice that I have this day taken and distrained (or "that as bailiff to C. D. your landlord, I have taken and distrained") on the lands and premises abovementioned, the several growing crops specified in the above inventory for the sum of £. being years' rent due to me (or "to the said C. D.") for the said lands and premises: and that unless you previously pay the said rent, with the charges of distraining for the same, I shall proceed to cut, gather, make, cure, carry, and lay up the said crops when ripe, in the barn or other proper place on the said premises, and in convenient time to appraise, sell, and dispose of the same, towards satisfaction of the said rent, and of the charges of such distress, appraisement, and sale, according to the form of the statute in such case made and provided. Given under my hand, &c.

Witness.

If the rent be not paid, nor the goods replevied before the time mentioned in the notice, the person distraining must go to the place where the distress is served, with a constable and two sufficient appraisers, who are to take the following oath:

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory, (*the constable at the same time holding the inventory in his hand, and shewing it to the appraisers*) according to the best of your judgment. So help you God.

The appraisement, and a memorandum of the administration of the oath above set forth, are usually indorsed upon the inventory thus :

Memorandum.

Memorandum, that on the day of in the
year of our Lord G. H. of and I. K. of
two sworn appraisers, were sworn upon the holy evangelists
by me, L. M. of constable, well and truly to appraise
the goods and chattels mentioned in this inventory, according
to the best of their judgment. As witness my hand.

L. M. (the constable),

Present at the time of swearing the
said G. H. and I. K. as above, and }
witnesses thereto.

N. O.

P. Q.

Form of Appraisement.

We the abovenamed G. H. and I. K., appraise and
value the goods and chattels mentioned in this inventory,
at the sam l. As witness our hands the day of
in the year of our Lord .

Witness R. S.

G. H. } Sworn
I. K. } Appraisers.

If the tenant request the landlord to give further time for
selling the goods distrained, and the landlord consent, the
better way for both parties is that the tenant should sign a
memorandum to the following effect:

Memorandum: that I, A. B., do hereby consent and
agree that C. D. my landlord, who hath distrained my goods
and chattels for rent in a dwelling house, &c. (*describing
the premises*) situate at in the county of
shall continue in possession of my said goods and chattels
in the said dwelling house, for the space of days from the
date hereof; the said C. D. having agreed to forbear the
sale of the said goods and chattels for the said space of time,
to enable me to discharge the said rent. And I the said
A. B. do hereby agree to pay the expenses of keeping the

said possession, and not to replevy the said goods and chattels. Witness my hand, &c.

Witness.

The stat. 57 Geo. III. c. 93. regulates the costs of distress made for the payment of small rents, where the sum due does not exceed 20*l*. In such cases no person making a distress can make any further charge than those mentioned in the schedule to that act; and the party aggrieved may apply to a justice of the peace, who may adjudge treble the amount of the monies unlawfully taken, to be paid with costs, which may be levied by distress; and if no sufficient distress, such justice may imprison the offender till the order is satisfied.

Schedule of costs and charges under this act.

Levying distress, three shillings.

Man in possession, two shillings and sixpence.

Appraisement, (*whether by one broker or more*) sixpence in the pound on the value of the goods.

Stamp.

All expenses of advertisements, ten shillings.

Catalogues, sale, and commission on delivery of the goods; one shilling in the pound, on the net produce of the sale.

It is, however, provided by the same act that no person aggrieved by any distress for rent, or by any proceedings in the course of it, or by any costs or charges in respect of the same, shall be barred of other legal remedies, except so far as any complaint shall have been heard or determined by the order and judgment of a justice under the act; which order and judgment shall be given in evidence under the general issue in all cases where the matter of such complaint shall be made the subject of an action.

By the sixth section of the same act every broker or other person who shall make or levy any distress whatsoever shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him to the person or persons upon whose goods or chattels any distress shall be levied; although the amount of the rent demanded shall exceed the sum of twenty pounds.

Where (o) goods were sold under a distress for rent, and a surplus remained in the hands of the constable, who became bankrupt, it was held that the tenant had no title to a preference before the other creditors; for, although it might be so where the goods remained in specie, yet here the money was embezzled, and the tenant could only come in with the other creditors, and on the same footing.

Where (p) the tenant of premises, demised at a rent payable half-yearly, agreed to pay all taxes, except the landlord's property tax, and agreed also to lay out 20% in repairs, which the landlord agreed to allow; and afterwards the landlord distrained for half a year's rent, and sold to the whole amount, without allowing either for repairs, or property-tax which he knew the tenant had paid to the collector; it was held that the tenant might recover, in respect of the property-tax, in an action for money had and received against the landlord; but not for the repairs.

In the whole course of the process of distress the landlord has no property in the distress; therefore, although the stat. 2 W. and M. permits him to sell, the vendee will be entitled immediately from the tenant, and not by the landlord. (q) If, however, the goods of an under tenant or stranger are distrained and sold by the landlord paramount, for the rent due from the immediate lessee, the money paid by the purchaser vests immediately in the landlord in satisfaction of the rent; and never becomes the money of the owner of the goods: therefore, the owner cannot in such a case maintain an action against the lessee, who owed the rent distrained for, for money paid to his use. (r) On the same principle it was determined by the barons of the exchequer, and affirmed on a writ of error, that if a distress be made for rent, and before the five days given by the act are expired an extent issues, though it be not levied, for a debt due to the crown, the extent will take place of the distress; for a distress is only a pledge: but the extent binds the property from the *teste* or *fiat*. (s)

(o) *Ex parte Dobson*, 7 Vin Abr. 74. 112. *Ex parte Devine*, 1 Cook. B. L.

(p) *Graham v. Tate*, 1 M. and S. 177.
609.

(r) *Moore v. Pyrke*, 11 East. 53.

(q) *Bradyll v. Ball*, 1 Bro. Ch. Ca. (s) *R. v. Cotton*, Burn's Just. tit.
437. *The King v. Cotton*, Parker Distress, by Chetw. Vol. I. p. 727.

Where (t) a landlord had distrained for rent arrear, and the tenant had replevied, and had sold a part of the goods on his own account by the permission of the landlord, and in the mean time the rest was seised under an extent tested after the distress for a debt due to the crown; which debt was satisfied out of the levy, according to the exigence of the writ; the landlord applied to the equitable jurisdiction of the exchequer to interfere, to enlarge the time for the return of the extent, in order that the sheriff might proceed against the lands of the debtor for the crown debt, on the ground that by the operation of the distress the defendant had not goods and chattels sufficient to pay the crown debt. (u) This application, it may be observed, was on rather a strained interpretation of the words of the great charter, "*Nos vero non seisiemus terram aliquam vel redditum pro debito aliquo quam diu catalla debitoris præsentia sufficiant ad debitum reddendum et ipse debitor sit paratus inde satisfacere.*" But the court, on general principles, thought that landlords had no equity which other creditors have not; a judgment creditor might do the same thing with more reason, for he has a special property in the goods. But in this particular case they held it to be an insuperable objection to this application that the crown's debt had been actually satisfied; and, therefore, the extent was *functus officio*. After the crown's debt was satisfied, the court could not look to the interest of other creditors.

A special injunction to restrain a defendant from distraining may be obtained in the exchequer before answer, if the defendant is in contempt for not answering. (v) But a lessee who is proceeded against in ejectment, by a person claiming his landlord's title, and at the same time is threatened by his landlord with distress, cannot sustain an injunction to restrain either the distress or the ejectment, because he cannot by such means bring his landlord's title into dispute. (x)

A heriot reserved upon a lease is in some respects similar to rent; it must be demanded; it may be distrained for; and the lessor may take any man's beast on the land, which may have come there, without his or his tenant's default; and, he may sell them, if not replevied by force of the stat. 2 W. and M. sess. 1. c. 5. So

(t) *Ex parte Taunton*, in the King v. Hodder, 4 Price 313.

(u) *Magna. Charta*, c. 8.

(v) *Heming v. Emus*, 1 Price 384.

(x) *Homau v. Moor*, 4 Price 5.

the landlord cannot distrain for it out of the land, any more than for rent: but it seems equally clear that he may seize his tenant's best beast wherever he finds it, whether on the premises or not; for, upon the death of the tenant, the property is vested in the lord. (y) The abusive taking for heriots in Ireland where none were due was restrained by the stat. 10 and 11 Cha. I. c. 10. Irish. But the act does not extend to cases where a heriot is reserved between lessor and lessee, and especially reserved in writing.

Before the stat. 8 Ann. c. 14. (z) executions took place of all debts which were not specific liens on the goods of the debtor. That statute, it has been before observed, entitles the landlord to one year's rent before the goods are applied to the purposes of the execution: but no more than one year's rent from the time of the execution. Neither the landlord, nor the execution creditor, can go upon the premises: but the sheriff only, by virtue of the execution. After the sheriff has notice of rent being due, he cannot remove the goods without satisfying the landlord; and unless the rent be paid, the sheriff must quit. If he does not quit, a special action on the case lies against him: but the landlord may also apply to the court to have restitution to the amount of the goods sold. (a)

This statute, however, is inapplicable both to extents directly at the suit of the king, and to extents in aid. They are both prerogative processes; for, although an extent in aid issues, in the first instance, in aid of the subject, it ultimately and in effect operates for the benefit of the king; and the word "extent" in the statute has been held, therefore, to be satisfied by applying it to extents of a private nature. (b) Outlawry at the suit of the king is privileged on the same principle: (c) but a *capias ullagatum* in a civil suit is only a private execution; and, therefore, the

(y) *Woodland v. Mantel*, Plow. 96. Willes 192.

a. *Odiham v. Smith*, Cro. Eliz. 589.
1 And. 298. Gouldsb. 191. Moor.
540. See *Nela*. Lutw. 438. *Osborne v.*
Sture, 2 Lutw. 1367. *Austin v. Ben-*
nett, 1 Salk. 356. *Parker v. Gage*, 1
Show. 81. *Scory v. Randall*, Hett.
57, 66. See *Nelson's Lex Maner*, 161.
contra. See also *Edwards v. Mosley*,

(z) Irish stat. 9 Ann. c. 8.

(a) *Darling v. Hill*, Rep. temp.
Hardw. 255. *West v. Hodges*, 2 Barnes
174. 8vo.

(b) *The King v. De Caux*, 2 Price
17.

(c) *R. v. Southerby*, Bann. 5. *B.*
v. Pritchard, 144. 269.

goods of a tenant are liable to a year's rent, notwithstanding outlawry in a civil suit. (d)

This statute in other respects, has been considered as entitled to a liberal construction; and, therefore, the words "the party at whose suit the execution is sued out, &c." have been held to mean either plaintiff or defendant, although it is afterwards said, "and the sheriff is required to pay to the said plaintiff as well the money so paid for rent, as the execution money." (e) A defendant's execution, therefore, for the costs of a nonsuit are within the statute, just as much as an execution at the suit of the plaintiff. (f)

If, on the goods of a tenant being taken in execution, an agent of the landlord takes from the sheriff's officer an undertaking for a year's rent, and consents to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff under the stat. 8 Anne, although the undertaking be void under the statute of frauds, or by any other means; for the landlord has waived the benefit of the statute. The sheriff sold the goods with his consent; and, therefore, the only remedy was upon the undertaking. (g)

The ground landlord cannot come in for rent on an execution against the underlessee; (h) nor, where (i) there are two executions, is the landlord entitled to a year's rent on each, for the statute intended only to continue the lien as to one year, and to punish him for his laches, if he permitted more to be in arrear. The rent is payable without any deduction for sheriff's poundage or any other charge. (j)

We have already mentioned that an action will lie against the sheriff for the tort; and the right of action may be transmitted to the executors or administrators of the landlord. (k) The summary relief by a rule of court can only be obtained by stating a full and clear case on motion. (l)

The sheriff is bound to retain one year's rent out of the proceeds, provided he has notice of the landlord's claim at any time

(d) Greaves v. D'Acastro, Bunb. 194.

(e) See the first section of the act.

(f) Henchett v. Kimpson, 2 Wils. 140.

(g) Rotherley v. Wood, 3 Campb. N. P. R. 24.

(h) Bennett's case, 2 Str. 787. Carr v. Goslington, 11 Mod. 414.

(i) Dod v. Saxby, 2 Str. 1024.

(j) Gore v. Goston, 1 Str. 643.

(k) Palgrave v. Windham, 1 Str. 212.

(l) Cook v. Cook, Andr. 218.

while the goods remain in his hands; and in one case (*m*) the court ordered the same to be paid to the landlord, although the notice was given after the removal of the goods. There is no obligation on the sheriff to find out what is due to the landlord, and to pay it to him without notice: therefore, the sheriff does not become a wrongdoer till notice. (*n*) In an action, however, against the sheriff the notice will be intended after verdict: (*o*) but a demand by one to whom administration is afterwards committed does not operate as notice by relation. (*p*)

The landlord can only claim the rent due at the time of the taking, and not what accrues due after the taking, and during the continuance of the sheriff's possession. (*q*) If the sheriff remain on the premises beyond a reasonable time, so as to injure the rights of the landlord, the latter may have his remedy by action on the case.

Where (*r*) goods were taken in execution, and the money levied, and then administration was taken out to the landlord who died intestate, it was held that the administrator came too late to have a year's rent: but the statute extends to executors and administrators, if they give notice in time. So also the trustees of an outstanding satisfied term may sue the sheriff for not retaining a year's rent after notice. (*s*)

The statute not having specified any form of notice, any notice is sufficient to put him on his guard; therefore, a notice stating the rent to be due to J. W., and the mortgagees of his estate, was held sufficient, although signed by a person who was not the receiver appointed by the mortgage deed. (*t*) So if it be proved that the sheriff, with knowledge that rent was due, proceeded to sell without retaining the rent, he will be liable without any specific notice from the landlord. (*u*) It is an infringement of the statute, if the sheriff remove any part of the goods. (*v*)

Where (*x*) the tenant committed an act of bankruptcy in Oct. 1810., and a commission issued on the 21st Jan. 1811, and the

(*m*) *Arnitt v. Garrett*, 3 B. & A. 440.

(*n*) *Waring v. Dewberry*, 1 Str. 97.

(*o*) *Palgrave v. Windham*, 1 Str.

212. See *post*. 675.

(*p*) *Waring v. Dewberry*, *add supra*.

(*q*) *Hoskins v. Knight*, 1 M. & S. 245.

(*r*) *Waring v. Dewberry*, Fort. 360.

(*s*) *Colyer v. Speer*, 2 Brod. and Bing. 67.

(*t*) *Colyer v. Speer*, *supra*.

(*u*) *Andrews v. Dixon*, 3 B. and A.

645.

(*v*) *Colyer v. Speer*, *supra*.

(*x*) *Lee v. Lopes*, 15 East. 280.

sheriff on the 7th Jan. 1811, levied an execution, under which he sold the goods, and out of the sum produced by the sale paid a year's rent to the landlord; in an action by the assignees against the sheriff for money had and received it was held that the sheriff was bound to prove that he paid the money over, before notice of the commission issued; for the act of bankruptcy and the commission had changed the property, and transferred it to the assignees.

In an action against the sheriff for an improper return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord for arrears of rent, it was held that he was bound to adduce some evidence that rent was due: but the landlord was not competent to prove it. (y)

Upon a motion for a new trial in the case of *Harrison v. Barry*, (z) recently decided in the court of Exchequer, the court were of opinion that in an action by the landlord against the sheriff upon this statute, the plaintiff having shewn a demise by him, and the occupation of the tenant, it lay upon the defendant to prove that the rent was paid, which he might have done by calling the tenant. A second point in this case related to the rent being a forehead rent, or rent stipulated to be paid in advance; and the court decided this point also in favour of the plaintiff; for they held that it was a rent due within the statute of Anne, and they said it might be distrained for either as against the tenant, or as against the judgment creditor, who makes title under an execution against the tenant's effects. Upon the trial another point was left to the jury, whether the possession under the distress was *bond fide*, or whether it was colourable and collusive, and for the purpose of delaying creditors? The only evidence for this was that the landlord who had distrained had not sold within the five days, by arrangement between him and the tenant. The court held this no proof *per se* of collusion. Sir W. D. Evans for the plaintiff made the motion. The court overruled all the objections, and granted a new trial.

In another case, (a) the same court held, where the landlord had recovered against the sheriff in a similar action, that it was no

(y) *Keightley v. Birch*, 3 Campb. N.P. R. 521.

(z) 7 Price Exch. Rep. 600.

(a) *Lane v. Crockett*, 7 Price Exch. Rep. 506.

ground for a new trial, that the goods having been afterwards returned, the plaintiff was not damnified; for, while they were in the custody of the law, the landlord could not distrain them. The court held, likewise, that the want of an allegation in the declaration that the sheriff had notice of the rent due according to the statute was not the subject of a motion for a new trial, but should be moved in arrest of judgment: which, as it had not been made within the four first days of the next term after the trial, as it might have been by moving it in the alternative, when the rule *nisi* was granted, could not then be made. The defendant afterwards brought a writ of error on the second point: and on that occasion, Abbott, C. J. observed, "that the declaration alleged that the sheriff had knowledge of the rent being due. The words 'well knowing the premises' will be sufficient for the purpose of that allegation; for it must be remembered that this is after verdict." Dallas, C. J. "The statute does not in terms require notice to be given; and the sheriff may, and often does, make himself a wrongdoer, where no notice has been given." The case of *Palgrave v. Windham* (b) having been mentioned, Abbott, C. J. observed, that, not fully understanding the statement of that case in the report, he had looked into the record, and found that notice was in fact given to the sheriff, and that the want of notice there spoken of meant want of notice to the plaintiff in the action, on which the execution was sued out. "But," observed his lordship, "the allegation of 'the defendant well knowing the premises,' is sufficient in this case, for it must refer to the whole subject matter of the declaration. If the present objection could prevail the object of the statute might often be entirely defeated." The court of error then affirmed the judgment.

Where (c) goods were seized under an extent in aid, and had been kept by the officers for a long time locked up on the premises, pending a reference of the prosecutor's claim, during which a subsequent arrear of rent accrued due, the court of Exchequer refused to interfere in the behalf of the landlord, so far as to order the effects to be sold, and the rent due to be paid out of the proceeds. The facts of this case were the following: the defendants, who were wine-merchants in Sept. 1815, (when the extent issued) occupied certain premises, consisting of vaults,

(b) 1 Str. 212. (c) The King in aid of *Mytton v. Hill*, 6 Price 19.

and a counting-house, on a lease for a term ending the Christmas following, at *which time* the defendants were indebted to the landlord for half a year's rent. After the extent had issued, the defendants agreed with the landlord, who was not aware of the extent, for an extension of the term to commence at the expiration of the former, under which (agreement?) the sum in question had become due for subsequent rent on the 25th March, 1818. The affidavit of the sheriff's officer, who made the seizure, stated that he was in possession of the property seized; but that the defendants had continued to occupy the counting-house over the vaults without interruption. Richards, Lord C.B. "Had the property been sold at once, it is admitted no question could have arisen. Then has the crown assumed a new character? The landlord might have been ignorant of the extent at the time: but he knew of it before Christmas, and still he suffers the defendant to continue his occupation as tenant; and there is no doubt an action might be maintained for use and occupation. And is he to be permitted to say, No? I will look to the crown who has made no engagement with him." Wood, B. concurred in this reasoning; and added, whether the officer has done wrong in staying so long on the premises, is a very different question, and that might be the subject of a special action on the case.

II. These several modes of recovering rent by action are next to be considered. And, first, the remedy by action of debt was given by the common law for rent reserved on leases for years; because, such terms being commonly of short duration, the lessor was allowed to follow the chattels of his tenant wherever he went, or wherever he removed them; but when rents were reserved on the durable estate of the feud, the feud itself and the chattels thereupon being considered sufficient pledges for the rent, and the lord having his writ of *cessavit* to recover the land itself, (*d*) the law gave no action of debt on a freehold lease during its continuance. But after the death of the *cestui que vie* the lessor had an action of debt for all arrears against the lessor, or his representatives, because the land was no longer a security for the arrears. (*e*) Now by the stat. 8 Ann. c. 14. s. 4. (*f*) an action of debt lies also for arrears on a freehold lease during its continuance, as well as on a lease for years.

(*d*) F. N. B. 478.

(*e*) Co. Litt. 62. a.

(*f*) Irish stat. 9 Ann. c. 8. s. 5.

The executor or administrator of a reversioner is entitled to an action of debt at the common law for rent incurred in his testator's or intestate's lifetime, in the same manner as for any other personal duty : but until the stat. 32 Hen. VIII. c. 37: the executors of tenants *pur autre vie* could not maintain such an action during the life of the *cestui que vie*. (g)

Where (h) the lessee for years dies intestate, and his administrator makes an underlease and dies, the executor of such administrator shall have the action of debt for rent reserved on the underlease, and not the administrator *de bonis non* ; for this last comes in by title paramount. So, if the rent being due to an intestate, the administrator receives a promissory note in payment, and then dies intestate, the administrator of the administrator, and not the administrator *de bonis non*, is entitled to the money on the promissory note ; for the promissory note has altered the property so as to make it due to the executor in his own right ; subject, nevertheless, to the debts of the first intestate, if unpaid. (i)

On a demise to the wife before coverture the action well lies against the husband or his representatives for rent incurred during the coverture. (k)

If the lessee assign his whole term to a stranger reserving rent, he may bring debt upon the contract against the assignee, or his representatives : but if he reassigns to the lessor, which, in effect, is a surrender, no action of debt can be maintained; and he must seek relief in equity, unless there is an express covenant by the lessor to pay the rent. (l)

Notice of the assignment of a lease to a lessor is not sufficient to discharge a lessee from debt for rent : but the lessor must accept the assignee as his tenant. (m) Payment of the rent by the assignee to the lessor is *prima facie* evidence of such acceptance : but if it can be proved that the lessor was not cognisant of the assignment, he may, notwithstanding, bring debt against the lessee. (n)

Where (o) A. leased to B. and C. for years, and B. assigned his moiety, it was held that A. might sue the lessee in possession, and

(g) Co. Litt. 162. a. See *ante*, 599.

(h) 3 Salk. 304. Ventr. 259.

(i) Anon. 2 Freem. 100.

(k) *Payne v. Minshull*. Tho. Raym. 6.

(l) *Lloyd v. Langford*, 2 Mod. 175.

(m) 1 Brownl. 20. Cro. Jac. 234.

1 Sid. 447. and 2 Saund. 181.

(n) *Wakefield v. Webb*, 2 Roll.

Rep. 247.

(o) *Waldron v. Vicars*, Palm. 283.

the assignee or both the original lessees only, at his election ; because the reversion remains entire ; and the act of the lessee can never divide the action of the lessor. (p) But where (q) in debt against an executor it appeared by the plaintiff's own shewing that there were two, it was held that this might be taken advantage of before verdict, but could not be moved in arrest of judgment.

An action of debt will not lie against a bankrupt after his certificate ; for the certificate is a bar. The estate of the bankrupt having been assigned by act of parliament, the law implies the assent of the lessor. (r)

All actions of debt for arrears of rent are limited to six years by the stat. 21 Jam. I. c. 16. : but this does not extend to actions of debt on deeds, the words of the statute being satisfied by debt for arrears of rent on demises without deed. (s)

By the stat. 4 and 5 Ann. c. 16. where any persons, against whom there is a cause of action, shall be beyond sea at the time of such action accruing, the person having cause of action shall have liberty to bring such action within such times as are limited by the statute of James abovementioned after their return.

Where a lease has been made by indenture by J. and A., reserving rent to J. only, the action may be brought by J. alone ; because the reservation makes it a debt to him only. (t) But joint-tenants, if they are joint lessors, must usually bring a joint action. Tenants in common may join or sever at election : but if they sever, the demand must be of a moiety of the whole rent, and not of a certain sum amounting to a moiety. (u)

Debt for rent brought within an inferior jurisdiction where the lands demised, or any part of them, lie out of it, is erroneous ; because eviction or suspension of rent may be part of the inquiry, concerning which they are not competent to inquire. (x)

If the rent has been suspended, the lessor cannot sustain the action of debt without shewing the re-entry of the lessee. (y)

(p) 3 Vin. Abr. 12. pl. 17. in marg. s. 14.

So if two lessees make partition, the action is, notwithstanding, entire.

(t) Wright v. Augur, 2 Keb. 319.

(u) Midgley v. Lovelace, Carth. 289.

(q) Goodwin v. Wickins, 1 Freem. 6.

See Sid. 402. and Blanchard v. Dyer, 2 Show. 446. *contra*.

(r) Wadham v. Marlow, 8 East.

(v) Drake v. Beare, 1 Lev. 104.

314. n. 1 H. Bl. 437. Cantrel v. Graham, 1 Barnes 60. 8vo.

(w) Collins v. Goldsmith, 1 Bulstr.

(s) Freeman v. Stacey, Hutt. 109.

205.

See Irish stat. 10 Ch. I. sess. 2. c. 6.

Every quarter's, half-year's, &c. rent is a separate debt for which distinct actions may be brought; and in this respect the nature of rent is distinct from contracts for sums in gross; for if a person contract by specialty to pay money at five several days, no debt will lie till all the days are past; although, if default be made on the first day, it is a breach of covenant. So, if it be due on recognizance, execution may be entered up after the first day, because they are in the nature of several judgments. (x) But if, in an action for one entire rent, the declaration be for a part only without shewing how the rest is satisfied, this is bad, because then it is like declaring upon an entire contract, which the law will not permit; (y) and this may be taken advantage of in arrest of judgment. (z)

An action of debt at the common law is in its nature local: (a) but, as against the original lessee, the lessor may bring it as well where the contract was made, as where the land lies. (b) If, however, the privity of contract fails, it is a local action, even where it is brought by the assignee of the reversion against the original lessee, notwithstanding the statute 32 Hen. VIII. c. 34. (c) because it was sustainable at common law, and is founded on the privity of estate. (d) So, although the rent be payable in London, yet, if the lands be in another county, the assignee of the reversion must bring his action in such other county where the lands lie. (e) If the action be between the lessor and lessee, and, consequently, transitory, an action of debt may be maintained in London, although the lands lie in Jamaica, Ireland, or any other foreign jurisdiction: a suggestion is entered in such cases on the roll, that such a place, in such a county, is next adjacent; and it may be tried here according to the laws of such foreign country by a jury from the

(x) Co. Litt. 292. b.

(y) Hulme v. Sanders, 2 Lev. 4.
Mounson v. Redshaw, 1 Saund. 201.
Baily v. Hughes, Cro. Car. 137.
Welby v. Phillips, 2 Vent. 129.

(z) Wentworth v. Abraham, Hott. 38.

(a) Year-book, 5 Hen. VII. 18. b.
Cro. Dett. 144. 1 Roll. Abr. 591.
B. pl. 2. Walker's case, 3 Rep. 42. b.
Treharne v. Claybrook, W. Jon. 43.

Barker v. Damer, Carth. 183. See 6 East. 352.

(b) Patterson v. Scott, 2 Str. 776. Dy. 40. a.

(c) See ante, 588.

(d) Thursby v. Plant, 1 Saund. 238.
Thrale v. Cornwall, 1 Wils. 183. Pine v. Lady Leicester, Hob. 37. See Buskins v. Edmund, Cro. Eliz. 636. contra.

(e) Bodd v. Cudmore, Cro. Car. 183.
Long v. Nethercote, Cro. Car. 143.

place suggested on the roll. On *nil debet* also the laws of such other country may be given in evidence. (f)

If the plaintiff declare for more than is due, he may relinquish that part which is not due, and have judgment for the rest; for his relinquishment of part does not falsify his writ, although the thing demanded be entire. So he may release as well after writ brought as before. (g)

In debt for rent, with several *nomine pœnæ*, it is sufficient to allege a demand on the rent days, without alleging demands at the several days the penalties accrued. (h) To give a title to the penalty there must be an actual demand of the rent with the same requisites as will be hereafter detailed, in treating of conditions of re-entry for non-payment of rent. (i) Lord Hobart (k) thought also that if the rent were not paid on the demand, the lessor must likewise demand the penalty: the better opinion, however, seems to be that no such second demand is necessary. So also if the lessor bring debt, or avow for the rent and *nomine pœnæ*, without laying an actual demand for the rent, though he cannot recover the penalty for want of the demand, yet he shall by his suit have judgment for the rent, because it is really due, and ought to be paid without demand. (l)

The old method of declaring in debt is now seldom had recourse to, except where the demise is by deed, being superseded in all other cases by the action for use and occupation: by which is usually understood an action of assumpsit. Where, however, the demise is not by deed, or no covenant has been sealed by the defendant, a count in debt for use and occupation may be sustained, (m) independently of the statute 11 Geo. II. c. 19. s. 14. hereinafter mentioned; in which the declaration need not set forth the particulars of the demise, and the contract may be given in evidence. (n) In such cases the defendant is entitled to a par-

(f) *Way v. Yally*, 2 Salk. 651.

(g) *Barber v. Pomeroy*, Styl. 175.
Anon. 1 Ventr. 49. *Thwaites v. Ashfield*, 5 Mod. 213.

(h) *Alfred v. Neville*, 3 Keb. 808.
Tracy v. Dutton, Cro. Jac. 617.

(i) *Howell v. Samback*, Hob. 133.
Co. Litt. 202. a. 1 Roll. Abr. 759.

(k) Hob. 208.

(l) *Grobham v. Thornborough*, Hob. 82. *Spencer v. Poyntz*, Godb. 154. *Howell v. Samback*, 1 Brownl. 179.

(m) *Barnard v. Duthy*, 5 Taunt. 27.

(n) *Wilkins v. Wingate*, 6 T.R. 62.
Stroud v. Rogers, C.B. Hil. T. temp. Geo. I. cited *ibid.* n. (a)

ticular of the plaintiff's demand, as in other actions; and if a second action is brought for the same rent, he may, by proper averments, shew that the plaintiff had before recovered the same rent in an action for use and occupation. (o) The action of debt for use and occupation is not local. (p)

The distinctions as to the form of action may appear technical: but it should be observed that an action of debt is the peculiar remedy of the lessor against a lessee for an apportionment of rent, where the lessee has been evicted by a third person of part of the land; for, as between lessor and lessee, the action of covenant is personal, and on a mere privity of contract; and the contract not being apportionable, the rent is not apportionable in an action of covenant. But an action against an assignee differs essentially from a mere covenant personal, because it is brought on a privity of estate; and, therefore, the rent in such a case might be apportioned. (q)

Acceptance of rent by the lessor from the assignee of the lease may be pleaded in bar to debt brought against the original lessee: but not to covenant, because in covenant the damages are not liquidated. (r)

In an action of debt for rent against an executor as executor, he cannot plead a bond debt of the testator unsatisfied, although the action is brought after the term is expired, because the debt for rent is as high in its nature as the bond debt. It was argued, indeed, that there was a distinction between an action brought during the term, and one brought after its expiration; because the rent might be preferred to a bond debt during the lease by reason of the goods of the tenant being liable to a real remedy by distress; but that when the lease was determined the rent was merely personal, and could not take place of specialties. The court, however, held that the debt still savoured of the realty, because the action was maintainable in respect of the profits enjoyed by the testator. (s) Where, however, the bond debt is due to the executor or administrator himself, he may plead a retainer in an action of debt for the rent. (t)

Riens in arriere is a good plea in debt for rent: the whole distinc-

(o) King v. Fraser, 6 East. 348.

(p) Egler v. Marsden, 5 Taunt. 26.

(q) 2 East. 579, 580.

(r) Arthur v. Vanderplank, 7 Mod. 198.

(s) 3 Salk. 161. 2 Ventr. 184. Godfrey v. Newton, 12 Mod. 7. Wentw. Off. of Ex. 209. 2 Salk. 284.

(t) Cage v. Acton, Cas. temp. Holt, 309. Stonehouse v. Ilford, Com. 145.

tion lies between debt and covenant. In covenant such a plea cannot be pleaded, because it confesses the covenant broken, and tends but in mitigation of damages : but an action of debt is to recover the specific sum due ; and, if that is paid, there can be no damages for the detention.

Nil debet is the general issue : but *riens en arriere* has been said to be the fairer plea, because *nil debet* puts the whole declaration in issue ; whereas *riens en arriere* confines the issue to the single fact whether such rent is due. There is, however, no substantial difference between them. Both are in the present tense, and refer to the time of bringing the action ; therefore, the only essential point for the defendant to answer is, whether rent was then due or not. (u)

Where (x) a lessee assigns his term, and afterwards the lessor releases to him all demands, this will not discharge the assignee ; for after the assignment the lessor has his election to charge either the lessee or his assignee ; and it shall, therefore, be intended, that he charges the assignee, if he makes no special declaration. So a release of all actions, debt, duties, and demands, does not discharge a future rent which is incident to the reversion : (y) but if the rent be due only by the contract, such a release has been held to extinguish the contract. (z)

Nil habuit in tenementis is equally bad as a plea in this action, as in a replevin : neither in general can the defendant give evidence to the same effect under the general issue ; for if the plaintiff can shew a taking or an attornment by the tenant, he is entitled to recover in this action, because such a taking or attornment is an admission of his title. (a) Where, (b) however, the plaintiff was grantee of the reversion, expectant on an estate for life, but never had been in possession, Lord Holt ruled that the defendant might give *nil habuit* in evidence under a plea of *nil debet*, although the plaintiff gave in evidence a note in writing signed by the defendant, by which he agreed to hold, and the tenant for life was dead at the time of giving the note.

Since the rule of strict consistency in pleading has been so much

(u) Warner v. Theobald, Cowp. 588. Henn v. Hanson, 1 Lev. 99. Ingram v. Gray, 3 Keb. 829.
Hare v. Savile, 1 Brownl. 19. See
Hard. 332. 2 Lord Raymond, 1503.
Bull. N. P. 190.

(x) Collins v. Harding, Meor. 544.

(z) Witten v. Bye, Cro. Jac. 486.

(a) 1 Holt. N. P. R. 495.

(y) Stephens v. Snow, 1 Salk. 578.

(b) Chetile v. Pound, 1 Lord Raym.

746.

relaxed, *non tenuit, riens in arriere*, and infancy, may be pleaded together. (c)

If the defendant plead levied by distress, and so he does not owe, he may give a release in evidence; for it proves there is no debt, and that is the issue: but if rasure of a deed be pleaded, nothing but the rasure can be given in evidence, for the issue then is *non est factum*. (d)

A tender may be pleaded: but where the defendant did not allege that he tendered the rent at the last moment before sunset, it was held to be ill pleaded, although cured by pleading tender to the person. (e) Neither is it sufficient to plead a tender the last instant before sunset, without averring that he was there long enough before sunset to have tendered the money. (f) Also if tender be pleaded, it must be pleaded with a *proferit in curia*. (g) But the defendant may likewise plead (if the truth be so), that he was at the house on the day an hour before sunset, and staid there on the same day till sunset ready to pay the rent, and nobody came to receive it; and that since then he has always been and is yet ready to pay the same; at the same time bringing the money into court: such a plea is good, without tender actually made. (h)

With respect to tender, it may here be observed, that if part only of the rent has been tendered, the lessor is not bound to accept it: but if he brings debt for several rents, and the lessee tenders the rent due on such a day, the lessor is bound to accept it: and the same law is of distresses. If, however, the lessor obtain a judgment for the whole in an action of debt, the whole becomes an entire duty; and, if upon execution sued out, the lessee tenders a part only, the lessor is not bound to accept it. (i)

Where (k) A. having two houses, with a long balcony common to both, leased one to B. generally, without mention of the balcony, and afterwards leased the other to C. with the balcony thereto belonging; and after the balcony had been divided unequally, B. paid rent: it was held that in debt, B. could not plead suspension of rent: first, because the balcony was never expressly leased;

(e) *Wilson v. Ames*, 5 Taunt. 340.

(d) *Galloway v. Susack*, Cas. temp. Holt. 299.

(e) *Keating v. Irish*, 1 Lutw. 590.

(f) *Tinckler v. Prentice*, 4 Taunt. 349.

(g) *Crouch v. Falstoffs*, Thos. Raym.

418. *Brown v. Hewley*, 1 Ld. Raym. 82.

(h) 3 Salk. 342.

(i) 3 Salk. 2.

(k) Anon. 3 Keb. 520.

and therefore never out of the lessor's possession ; and secondly, if it were let, yet the payment of rent had purged the tortious entry, they being at least tenants in common of the whole till division.

Where (l) the defendant pleaded that a lease for 1000 years had been made previous to his demise, by bargain and sale to another, by whose attainder the possession became vested in the king, it was held that the attainder being stated, it was a sufficient eviction without entry or office alleged ; nor need any entry of the first lessee have been alleged, since he was in by the statute of uses : and although such a possession is usually only for the purpose of assigning, and not to maintain trespass, yet the king was held to be in actual possession as much as if the party had actually entered. A common person could not have been so considered, without actual entry on the first lessee. So an extent and *liberate* is not well pleaded without pleading the inquisition ; for otherwise there is no lawful eviction. (m)

If the lessor by the lease covenant to deduct so much for any charges to be paid by the defendant, the covenant being by the same deed, may be pleaded in bar to an action of debt for rent, and the lessee shall not be driven to a circuity of action by bringing covenant. (n)

Where (o) the declaration stated that the lessor was bound in a statute to the plaintiff, under which the rent and reversion were extended, and the defendant pleaded a previous statute to B., upon which the rent and reversion had been also extended ; to which the plaintiff replied, that the last mentioned conusor, after the statute made to him, had taken a lease for years of the reversion, and so had suspended his statute. Although it was argued that the plaintiff could not in this way avoid the extent of the first conusor because it was of record, and consequently must be avoided by matter of record ; yet the court held that after the plaintiff had once extended the reversion, and such reversion had been delivered to him, he might avoid the former extent by plea, without being put to his *audita querela*. The modern practice, it may be observed, is to interpose in a summary way by a rule of court on motion, in all cases in which the party would

(l) *Banks v. Smith*, 2 Keb. 364, *The City of Exeter v. Clare*, 3 Keb. 444. 331.

(m) *Vochell v. Duncastell*, Moor. (o) *Harrington v. Garroway*, Cro. 891. Jac. 477. But see *S. C. Cro. Jac.*

(n) *Johnson v. Carre*, 1 Lev. 152. 569.

have been entitled to relief by the old writ of *audita querela*. The principle, however, of the case stated, is not altered by this change of practice.

In debt for rent the defendant pleaded the general issue. (p) The case turned out to be that the defendant was administrator to the lessee, who died indebted for rent. Since his death the defendant had occupied as administrator and assignee in his own right, and he also became indebted to the plaintiff for rent. At the trial it was insisted that he had discharged all the rent due from him in his own right; and in support of this position the two following receipts were produced, *viz.* 1. "8th of April, 1735. Received of A. 140*l.* for rent due to B., from the late Mr. P. (the original lessee)." And, 2. "21st of October, 1735. Received of A. 140*l.* for rent due to B." And, it was contended for the defendant that he might apply the money paid on this last receipt to the discharge of the rent due in his own time: but the court held that the rule of "*quod quicquid solvitur est ad modum solventis*" was not applicable: for though a person indebted to another on different contracts may at the time of payment apply the money to the discharge of which contract he pleases; yet, if he pay money generally, it is in the power of the person receiving to apply the money as he pleases. (q) It did not appear whether the defendant had assets or not. (r)

The rule as to this kind of option is borrowed from the civil law; according to which the election, as well in the case of the creditor as in that of the debtor, was to be made at the time of payment. The words of the digest are: "*in re præsenti statim atque solutum est: postea non permittitur.*" (s) In the absence of any express declaration by either debtor or creditor at the time of payment, the application was made in the manner most beneficial to the debtor, *viz.* to the most burthensome debt; to one that carried interest rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which was first contracted. (t)

(p) *Bowes v. Lucas*, Andr. 55.

Ca. 605.

(q) *Manning v. Western*, 2 Vern. 606.

(s) Dig. lib. 46. tit. 3. Q. 1. 3.

(t) Dig. lib. 46. tit. 3. Q. 5.

(r) *Devaynes v. Noble*, 1 Meriv. Ch.

Some cases (u) indeed, including that abovementioned, seem to have extended this principle beyond its original meaning, and to hold that the creditor, in the absence of any express stipulation by either party, may retrospectively elect at any time how the payments shall receive their application: but others clearly (x) recognize the civil law principle of decision.

A note of the receipt of the last half year's payment is only evidence of the payment of all preceding rents: but it is no discharge of former arrears, except it be under hand and seal, and then it is only a discharge by estoppel. (y)

Payment of rentcharges to persons to whom the lessor had covenanted to pay, and at the command of the lessor, are good evidence of payment to the plaintiff himself; for payment to another by plaintiff's appointment is payment to himself. (z) But payment to a *feme-covert* of her husband's rents is no payment any more than to a mere stranger, because she has nothing to do in law with the receipt of rents. Therefore even where (a) the *feme* made a lease before coverture, and the tenant not having notice of the coverture paid the rent to the wife after marriage, the court held that he did so at his peril, and the husband might recover it from him a second time.

The statutes of set-off (b) are applicable to actions of debt for rent as well as to covenant and assumpsit for the same purpose; the demand to be set off must be liquidated, and such as might have been made the subject of one or other of these actions. The debts must be mutual and due in the same right; therefore, a joint debt cannot be set against a separate demand, nor a separate debt against a joint one, unless it be so agreed by the parties. (c) So a debt owing by the wife *dam sola* cannot be set off against an action brought by the husband alone, unless he has promised to pay the debt after marriage, and thereby made it his own. (d)

(u) *Goddard v. Cox*, 2 Str. 1194.
Wilkinson v. Stern, 9 Mod. 427. *Newmarch v. Clay*, 14 East. 239. and *Peters v. Anderson*, 5 Taunt. 596.

(x) *Meggott v. Mills*, 1 Lord Raym. 286. and *Dowe v. Holdsworth*, Peake, N. P. C. 64.

(y) *Cooms v. Denne*, 2 Keb. 346. *Phill. Ev. Vol. I. 155.*

(z) *Taylor v. Beal*, Cro. Eliz. 222.

(a) *Tracy v. Dutton*, Cro. Jac. 647.

(b) Stat. 2 Geo. II. c. 32. s. 13. Stat. 8 Geo. II. c. 24. s. 4. Irish Stat. 25 Geo. II. c. 8.

(c) *Kinnerley v. Hensack*, 2 Taunt. 170.

(d) 2 Esp. N. P. R. 594.

Neither can a defendant, sued as executor or administrator, set off a debt due to him personally; nor, if sued for his own debt, can he set off what is due to him as executor. And where an executor sues for a cause of action arising after the testator's death, the defendant cannot set off a debt due to him from the testator. (e) But in this action the defendant cannot, under a plea of *nil debet*, give evidence of disbursement for necessary repairs; not even where they ought to have been made by the plaintiff; (f) unless perhaps in the case of a lease, where it is part of the covenant that the tenant should deduct for rent. (g)

Mr. Phillips has observed that Chief Baron Gilbert lays it down in his treatise on evidence, that a release is not admissible under the plea of *nil debet*: but that the reason given by him, namely, that the release ought to be pleaded to enable the court to judge whether the debt is discharged with those apt words and solemnities, which the law requires to make a good contract, is not satisfactory; and he conceives that the cases which determine that a release is admissible in evidence under the plea of non-assumpsit are so many authorities for holding a contrary doctrine. (h)

III. The action of assumpsit for use and occupation did not lie originally for rent arrear on a regular demise, because the landlord was supposed to have his remedy upon the contract. A question therefore frequently arose in these cases, whether the agreement was a demise, or a promise to pay a sum in gross: (i) but if, after rent became due, there was any new consideration, or an express promise for the payment of the rent due, the action was maintainable. (j) So if there was an account stated, and rent appeared to be due among other things: (k) or if the de-

(e) *Shipman v. Thompson*, Cas. Prac. C. P. 151.

(f) *Taylor v. Beal*, Cro. Eliz. 222. (Gawdy J. contra) Bull. N. P. 177. Gilb. Ev. 242. Chief Baron Gilbert thinks this evidence admissible.

(g) 1 Lord Raym. 420. 2 Phill. Ev. 94.

(h) Anon. 5 Mod. 18. *Cecil v. Harris*, Cro. Eliz. 140. *Galloway v. Smeech*, 1 Salk. 284. ruled by Holt, C. J. See 2 Phill. Ev. 94.

(i) *Stroud v. Hopkins*, 3 Keb. 327. *Symcock v. Faya*, Cro. Eliz. 786. See Winch. 15. *Trevor v. Roberts*, Haerd. 266. *Potter v. Fletcher*, 1 Vin. Abr. 272. *Mason v. Beldam*, 3 Mod. 73.

(j) *Bowncroft v. Lane*, 1 Vin. Abr. 272. pl. 2. *Stundin v. Alban*, Cro. Eliz. 47. *Shirley v. Albany*, 1 Leon. 172. S. C.

(k) *Ayre v. Sils*, Styl. 131. *Luther v. Malya*, 1 Vin. Abr. 274. pl. 11.

defendant made an express promise before the demise, the making of the lease afterwards did not extinguish the right of action on the original promise. (l) The express promise therefore in all cases was the gist of the action, and was considered to be in the nature of an express covenant to pay the rent in a lease by deed, (m) which is collateral to and independent of the main contract. After verdict, or upon demurrer, the court would extend a promise, (n) and an express promise to pay 20*l.* for every one of five years has been held sufficient to maintain a separate action for every year's rent. (o) But where the promise was to pay annually, it was said the action would not lie for half a year *secundum ratam*. (p)

Now by the 14th section of the stat. 11 Geo. II. c. 19. (q) this action is given where the agreement or lease is not by deed; and, if any parol demise or demise in writing without deed shall appear, the fixed rent shall be evidence of the quantum of damages, and shall not defeat the action as it might have done before the stat. 11 Geo. II. (r)

Although this action is not maintainable where the demise is by deed, yet if there is an agreement by deed to demise the house by words not amounting to a demise, the landlord may, notwithstanding, have his remedy by the action for use and occupation: (s) but *semble*, this could not be, if there was an actual covenant for payment of rent.

This action depends either on an actual occupation by the defendant or his tenant, or an occupation which the defendant might have had, if he had not voluntarily abstained from it. (t) Therefore, if A. agreed to let lands to B., who permits C. to occupy them, A. may recover against B. for use and occupation, though

(l) *Jones v. Clarke*, 2 Bulstr. 73. Styl. 53. 400. *Brett v. Read*, Cro. Car. 343.

(m) See *Johnson v. May*, 3 Lev. 150. *Mason v. Beldham*, 3 Mod. 73. *Dartnal v. Morgan*, Cro. Jac. 598. *Lance v. Blackmore*, Styl. 463.

(n) *Trevor v. Roberts*, Hardr. 366. *Johnson v. May*, *supra*. *Munday v. Bailey*, Al. 29. *contra*.

(o) *Hunt v. Sone*, Cro. Eliz. 116. *Reade v. Johnson*, Cro. Eliz. 242. *Freeman v. Bowman*, 2 Keb. 291.

Acton v. Symonds, W. Jon. 364. *Slack v. Bowsal*, Cro. Jac. 668. *Symcock v. Pain*, Cro. Eliz. 786. *Clark v. Palady*, Cro. Eliz. 859.

(p) *Wentworth v. Abraham*, Hcdl. 53.

(q) Stat. 23 and 24 Geo. III. c. 46. s. 3. Ireland.

(r) See *Stroud v. Hopkins*, 3 Keb. 357.

(s) *Elliott v. Rogers*, 4 Esp. N.P.C. 59.

(t) *Winch*. 27.

he never occupied. (u) But where (v) A. leased lands to B., who underlet to C. and others, and during these tenancies A. gave notice to C. and the others to quit, in consequence of which C. did quit, and the lands remained unoccupied for a year ; although they were then relet by B., it was held that A. could not recover against B. for the intervening year; and it was thought that under these circumstances an eviction might have been pleaded for the whole.

So if the landlord in the middle of a quarter accept from his tenant the key of a house, demised under a parol agreement, that the rent should cease on his giving up the premises, and he never after occupies the premises, no action for use and occupation lies for the time subsequent to his taking the key. By the act of taking the key the landlord actually takes possession, and the defendant cannot be considered as occupying at the same time. (x) But if the defendant quit the premises before the expiration of his term, and the plaintiff put up a bill on the premises to let them, this will not prevent the plaintiff recovering : for it cannot be inferred from that circumstance that the contract is at an end ; and it is for the benefit of the defendant that the premises should be let, if he cease to occupy them. (y) So if in the middle of a quarter the landlord give his tenant from year to year a parol licence to quit, the landlord may recover, although the tenant quit accordingly, because the tenancy cannot thereby be terminated : and it does not amount to a retaking of the possession by the landlord so as to prevent the occupation of the tenant. (z)

In an action for use and occupation for six months it is sufficient *prima facie* for the plaintiff to shew that the defendant occupied during the six months previous to those for which the action is brought, since the continuance of the occupation is to be presumed till the contrary is shewn; and it is not sufficient for the defendant to shew that the keys had been previously delivered to a servant at the plaintiff's house, and a subsequent declaration of the plaintiff that the keys were mislaid or lost. (a)

(u) Bull v. Sibbs, 8 T. R. 327.

(y) Redgarth v. Roberts, 3 Esp.

(v) Burn v. Phelps, 1 Stark. N. P. C.

N. P. C. 225.

94.

(z) Mollet v. Brayne, 3 Campb. 103.

(s) Whitehead v. Clifford, 5 Taunt.

(a) Harland v. Bromley, 1 Stark.

518.

N. P. C. 455.

The landlord of premises demised under a written agreement, may recover for use and occupation, though the house be burned down before the rent accrued, and be no longer inhabited by the tenant; for the tenant might have rebuilt, whereas the landlord would have been a trespasser. (b) So where (c) on special *assumpsit* it appeared that A. had agreed to purchase B.'s equitable interest in land, for a term of years, at a specified rent, A. after paying rent for several years, and acknowledging that a further sum was due for arrears, could not resist B.'s claim for such further rent at law, by shewing that he had not been able to use the land. His remedy must be in equity.

Where premises are let at an entire rent, an eviction of part, if the tenant thereupon gives up the residue, is a complete defence to an action for use and occupation; for after eviction the landlord cannot recover on the original contract, and the tenant by giving up the possession of the residue is entirely discharged: (d) but if the tenant after eviction of part continues in possession of the residue, he will be liable on the count for *quantum meruit*. (e)

Where (f) premises have been let to B. for a term determinable on notice to quit, and pending such term C. applies to the landlord to become tenant instead of B., and on the landlord's consenting stands in B.'s place and offers to pay the rent, although B.'s tenancy has not been determined, either by a notice to quit or a surrender, C. cannot set up B.'s title in an action for use and occupation.

This action is not co-extensive with debt; therefore, a husband is not liable to an action for the use and occupation of a house enjoyed by his wife *dum sola*, although the wife was married in the middle of the half year before the rent accrued. So also where (g) A. having an equitable interest in a house, under an agreement for the lease of it, permitted his mistress to occupy it, and it was afterwards agreed between them that she should

(b) *Baker v. Holtzappfell*, 4 Taunt. 46.

(c) *Conolly v. Baxter*, Stark. N.P. C. 525.

(d) *Smith v. Raleigh*, 3 Campb. N.P. C. 513.

(e) *Stokes v. Cooper*, 3 Campb. N.

P. C. 514, (n.)

(f) *Phipps v. Sculthorpe*, 1 B. & A. 50. *Thomas v. Cooke*, 2 Stark. N.P. C. 408.

(g) *Keating v. Bulkeley*, 2 Stark. N.P. C. 419.

take up the bills which he had accepted in part payment of the purchase money, and that the lease should be assigned to her; although she remained in possession, and did not take up the bills, and then married the defendant, it was held that the rent previous to the marriage could not be recovered against the defendant during the occupation of his mistress.

Upon the same principle, where (*h*) a tenant from year to year becomes bankrupt in the middle of the year, and his assignees enter and take possession for the remainder, the landlord cannot recover against the assignees for the bankrupt's occupation without proving their special instance and request for the bankrupt to be permitted to occupy during the time elapsed before the bankruptcy.

The title of the lessor cannot be disputed in this action, because it is founded on a personal contract, in which it is not necessary for the plaintiff to shew any title; and upon proof of enjoyment he is entitled to a compensation. (*i*) If the tenant pays rent, and then disclaims the title of his landlord, he ought to give back the possession. (*k*) Therefore the tenant of a glebe, who has paid rent to the incumbent, cannot give in evidence a simoniacal presentation to the plaintiff, in order to avoid his title. (*l*) So where (*m*) the defendant came in under the plaintiff, he cannot shew that the plaintiff's title has expired, unless he solemnly renounce the plaintiff's title at the time, and commence a new holding under another. (*n*)

If the defendant did not come in under the plaintiff, the plaintiff can only recover from the time he had the legal estate in him, although he may have had the equitable estate long before. (*o*) Where, (*p*) however, the trustees of a person, of whose title the defendant had notice before he paid the rent to the landlord, brought the action, it was held that they might recover, although he had no notice that the legal title was in the plaintiffs on the record. Submission to a distress for rent stated in the notice of

(*h*) *Nash v. Tatlock*, 2 H. Bl. 319. N. P. C. 11. *England d. Syburn v.*

(*i*) 5 T. R. 4. 1 Wils. 314. Bull. Slade, 4 T. R. 682.

N. P. 139.

(*n*) See *Fenshaw v. Creamer*, 2 Keb.

(*k*) *Doe d. Knight v. Lady Smythe*, 624.

4 M. and S. 347.

(*o*) *Cobb v. Carpenter*, 2 Campb.

(*l*) *Cooke v. Loxley*, 5 T. R. 4.

N. P. C. 13 n.

(*m*) *Balls v. Westland*, 2 Campb.

(*p*) *Lumley v. Hodgson*, 16 East. 99.

distress to be due from the defendant as tenant is an acknowledgment of title, and will preclude evidence to the contrary. (q)

The grantee of an annuity, after recovery in ejectment against tenant from year to year in possession, is entitled to recover in this action all the rent from the time of the notice to the day of the demise laid in the ejectment; but not after, because the tenant after that is a trespasser. (r)

A corporation aggregate may maintain this action: but where, (s) in the case of a dean and chapter, the name of the present dean was mentioned; and it was alleged that the defendant occupied by the permission of the said dean; and in evidence it appeared that he occupied only by permission of a former dean: it was held to be a fatal variance.

Where (t) several persons rent premises as a place of worship, the seats of which are let out by an officer, annually appointed for that purpose, who receives the rent, and applies the rents partly to the payment of the rent of the premises, and partly to general purposes, the lessees may maintain the action against the occupier of the seat: but in an action by the surviving owner it is not sufficient to allege that they were held under the survivor, where in truth they were held under two jointly.

The action may be maintained in its most general form. Neither the particulars of the demise, nor the entry of the lessee, nor the time the rent became due, need be set forth. The action likewise is not local; and, therefore, the parish in which the lands lie need not be mentioned: but if the plaintiff undertake to set forth the parish particularly, a variance is fatal. (u)

Although an agreement be void by the statute of frauds as an agreement or as a lease; nevertheless, if the tenant take possession under it, recourse may be had to it in an action for use and occupation to calculate the amount of the rent. (x) And if the premises have been demised by an agreement in writing, but not stamped, the plaintiff is nevertheless bound to give it in evidence

(q) *Panton v. Jones*, 3 Campb. N. P. C. 372.

(r) *Birch v. Wright*, 1 T. R. 378.

(s) *Dean and Chapter of Rochester v. Pierce*, 1 Campb. N. P. C. 466.

(t) *Israel v. Simmons*, 2 Stark. N. P. C. 356.

(u) See *King v. Fraser*, 6 East. 347. *Kirtland v. Pounsett*, 1 Taunt. 570. *Wilson v. Clark*, 1 Esp. N. P. C. 279. *Guest v. Caumont*, 3 Campb. N. P. C. 235.

(x) *De Medina v. Polson*, 1 Holt. N. P. C. 47.

at the trial, because it is a specific contract ; and the plaintiff is bound to shew it ; for it may contain clauses which may prevent the plaintiff from recovering, and others for the benefit of the defendant. If it is not stamped at the trial the plaintiff must be nonsuited, because it is not admissible evidence in that state. (*y*) But such an agreement is only evidence of the amount of rent to be paid where the lessee has enjoyed under such agreement.

Where (*x*) the assignees of a bankrupt (defendants) produced under a notice from the plaintiff in an action for use and occupation the deed of assignment of the bankrupt's effects, it was held that it was admissible in evidence, though not proved by the attesting witness, it having been shewn that the defendants occupied under the deed. It came out of the possession of the defendants, who had taken a beneficial interest under it, and, therefore, must be deemed to have admitted the execution. The earlier cases laid down the rule, that when an adverse party, having a deed in his custody, produced it on notice, it should be deemed to be duly executed without driving the party calling for it to the necessity of proving the execution by the attesting witness. That rule proceeded on the ground (which subsequent practice has in some degree removed) that the party calling for the deed could not be supposed to know the name of the attesting witness. The case of *Gordon v. Secreten* (*a*) expressly overruled this doctrine : but in the case of *Pearce v. Hooper* (*b*) the rule was revived with the modification that the execution should be admitted only in those cases where the party producing it had claimed a beneficial estate under the deed. In this case *Richardson, J.* said the circumstances were not so strong as those in *Pearce v. Hooper* ; but sufficiently so to justify the admission of the deed without calling the attesting witness.

In an action for use and occupation, charging in his own right the defendant, who was administrator, for rent due after the intestate's death, it was held that, though the defendant had taken possession, yet, having proved that the premises were not productive, and that eight months after the death of the intestate he had offered by parol to surrender the premises, such proof con-

(*y*) *Brewer v. Palmer*, 3 Esp. N. P. 139.

C. 213.

(*a*) 8 East. 548.

(*z*) *Orr v. Morice*, 3 Brod. & Bing.

(*b*) 3 Taunt. 60.

stituted a good defence to the action. Dallas, J. delivered the judgment of the court. "This was an action for use and occupation; and the defendant can only be liable as the personal representative of his brother who died intestate. The plaintiff sued the defendant generally, and did not describe him as an administrator in the declaration. He must, therefore, be considered as having made his election, and charged the defendant as assignee. Some evidence was given at the trial that the defendant had taken possession of the premises after the death of the intestate; and that eight months after the death he offered by parol to give up possession of the premises, or to surrender the interest to the plaintiff: but that the plaintiff had taken no notice of such offer, as it was not made in writing. It is quite clear that the plaintiff, not having sued the defendant as an administrator, could not recover from him in that capacity; and it is equally clear that if the defendant were not in possession, he could not be liable *de bonis propriis*. The court at first doubted whether, as it appeared that he had taken possession, it was necessary that he should surrender the premises to the plaintiff in writing: but are now of opinion that the parol offer was enough." (c)

Where (d) a lessee took a farm under an agreement which he never signed, and the terms of which his lessor in a material point failed to fulfil, the court said the lessee could scarcely be said to have so enjoyed: but that, at all events, the defendant in an action for use and occupation, as in an action of debt for rent, might shew an eviction for the whole or of part: and that, in case of an eviction of part, the jury must ascertain, independently of any agreement, what the defendant ought to pay.

Where the rent was specified in a written agreement to be 26*l.* a year, and the landlord proposed to shew by parol that the tenant had also agreed to pay ground-rent, the court refused the evidence. (e) But where parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it appear that it was between the parties as landlord and tenant, and that it continued in force to the very time to which the parol evidence applies. (f)

(c) *Remnant v. Breembridge*, 2 B. Moor. 94.

(e) *Preston v. Merceau*, 2 Bl. 1249.

(d) *Tomlinson v. Day*, 2 Brod. and B. 680.

(f) *Doe d. Wood v. Merriis*, 12 East. 237.

A plea that the plaintiff before action brought took and detained, as a distress for rent, goods of sufficient value to satisfy the rent, is bad, because it does not shew that the rent has been thereby satisfied; for the distress may have been rescued, or the plaintiff may have abandoned it. (g)

If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account rates which have been irregularly assessed on him, and the landlord promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment in an action for use and occupation. (h)

In this action the defendant may apply to the court for the common rule for liberty to pay the sum due, and to have the same struck out of the declaration: if after that the plaintiff proceeds, it will be at his peril. This common rule can only be obtained on payment of costs: but, if the plaintiff's conduct appear to be oppressive, the court will upon application discharge the defendant from the payment of costs. (i)

The action for use and occupation cannot be maintained in the court of conscience of the city of London. Though it existed before, it did not receive the sanction of the legislature till the stat. 3 Jam. I. c. 15.; by the sixth section of which it is provided that nothing in the act should extend to any debt for rent upon any lands or tenements, or any other real contract. (k)

IV. The action of covenant is a remedy peculiar to contracts under seal; and the only difference between an agreement and a covenant is that the latter is under seal. It may be brought either on the privity of contract, or the privity of estate. If it is founded on a privity of estate, it is local; if on a privity of contract, it is transitory. The lessee may, therefore, bring covenant against the lessor, and the lessor against the lessee, in any county. So also, if the assignee of the reversion bring covenant against the lessee upon a covenant running with the land, it is a transitory action, because the statute 32 Hen. VIII. c. 34. (l) transfers the pri-

(g) *Lear v. Edmonds*, 1 B. and A. 578.

157.

(k) *Woolley v. Cloutman*, Dougl.

(h) *Roper v. Bumford*, 3 Taunt. 16. 244.

(i) *Johnson v. Houlditch*, 1 Burr, (l) See *ante* 588.

privity of contract, with respect to such covenants, in the same plight as between lessor and lessee. (l) But an action of covenant against the assignee of a term, or by the assignee of a term against the lessor or his grantee, is local, because it lay at the common law upon the privity of estate. It will follow also that an action of covenant by the assignee of a reversion against the assignee of a term must be local, because the statute 32 Henry VIII. transfers the privity in the same state that the lessor had it. (m) In most cases, however, if the action is brought and tried in a wrong county, the plaintiff is aided after verdict. (n)

Where the action is on the privity of estate, it will not lie in England for lands out of it: but on the privity of contract an action of covenant for lands in Ireland, or any other foreign country, may be tried here by making a suggestion on the roll to that effect, and changing the *venue* to the next English county. (o)

Where (p) in an action of covenant a view was proper to be had, the *venue* has been changed, although most of the plaintiff's witnesses resided in the county where the *venue* was at first laid. So where (q) there was a special issue of *non infregit conventionem* to a covenant to repair, the court held it to be a mis-trial to try the issue any where but in the county where the lands were situated.

If the lessor have a reversion in fee of one house, and the reversion only for years of another, and he demise both, he may nevertheless have but one action on the contract: so, if he assign the reversion in both over to the same person, the assignee is not driven to several actions. (r) So where the reversion is assigned to different persons, they may join in covenant; for it is

(l) *Thrale v. Cornwall*, 1 Wils. 165.
Thursby v. Plant, 1 Saund. 237.
Creswick v. Saunders, 2 Show. 200.
contra.

(m) *Spencer's case*, 5 Rep. 17. a.
 F. N. B. 146. C.

(n) Stat. 16 and 17 Ch. II. c. 8.
 Irish stat. 17 and 18 Ch. II. c. 12.
The Mayor of London v. Cole, 7 T. R. 583.
Calverley v. Leving, Comb. 472.
The City of Litchfield v. Slater,

Willes 431.

(o) *Jackson v. The Mayor of Berwick*, 1 Mod. 36. *Crisp v. The Corporation of Berwick*, 1 Lev. 252.
Wey v. Yalley, 6 Mod. 194. *Smith v. Batten*, Cro. Jac. 142. See *Barker v. Damer*, 1 Salk. 80.

(p) *Hodinott v. Cox*, 8 East. 268.

(q) *Gilbert v. Martin*, 1 Lev. 114.

(r) *Pyot v. St. John*, Cro. Jac. 329.

only a personal action to recover damages, which tenants in common may do. (s)

If it appears by the declaration that the estate of the lessor is in joint-tenancy, the court will not on demurrer intend the death of other joint-tenant in support of the declaration, where the death of the other joint-tenant has not been averred. (t) So also, although in a lease by two jointly the rent be reserved to one only, they must both join in covenant, although debt might have been brought by him alone to whom the rent was reserved. (u)

In a recent case (x) the court decided without much difficulty that tenants in common might sue in covenant for neglect of repairs the lessee of a house who, subsequently to the demise, but before the breach alleged, became a co-tenant with the plaintiffs in the same house. It seems to be evident that if one tenant in common may lease his share to his companion, there could be no difficulty in this case; for, to the extent that the plaintiffs were interested, no act of third parties could alter the relation of landlord and tenant which existed previously.

In the great bulk of cases, where it has been holden that if there are not proper parties to the record in actions *ex contractu*, advantage must be taken of it by plea in abatement, the objection has been that others ought to be made co-defendants with the defendant on the record; and there is an essential difference between such cases, and where the objection is that there are not proper parties plaintiffs in the suit. Many plaintiffs can have but one right and one cause of action, which ought to be, and is, indivisible, and admits but of one satisfaction. But if, on principles of law it could be that a man should derive a several interest from a joint obligation, this would harass defendants grievously; and the contrary is therefore established by several authorities, (y) which shew that joint-tenants must plead and be impleaded jointly. Whereas in the case of defendants, with respect to the satisfaction which they are to make, it is exactly the same thing whether they are sued singly or with others; for every individual co-defendant is liable to the whole demand, and execution may be had against any one. In what proportion the rest should contribute is only

(s) 2 Salk. 303.

(t) Scott v. Godwin, 1 B. and P. 67. 660.

(u) Wright v. Augur, 2 Keb. 319. Yelv. 177.

(x) Yates v. Cole, 2 Brod. and B.

(y) Slingsby's case, 5 Rep. 18. b. Co Litt. 180. b. 182. a. 197. b.

matter among themselves. (s) The writ, therefore, may abate amongst co-defendants; but cannot be barred, because the plaintiff has an absolute right to sue the defendant on the record. The defendant can only insist, if he pleases, that the plaintiff shall sue the others with him : but he waives the advantage, if he do not plead in abatement. (a)

The proper mode of declaring in covenant is to set out, that by indenture certain premises, therein mentioned, were demised, (without stating them particularly,) subject amongst other things to a proviso, (setting out the substance of the covenant and the breach.) (b) If the plaintiff undertake to set out the contract more particularly, and fail to set it out correctly, although in a part in which no breach has been assigned, the variance is fatal ; because in actions founded on contract. it is necessary to prove the contract as laid. (c)

With respect to actions brought by the assignee of the lessor, it is the established practice to state the exact title, because in that case there can be no estoppel : (d) but if the lessee has had the fruits of his lease, the estate of the lessor is immaterial. (e)

In assigning the breach of a covenant, it is sufficient if it be certain to a common intent. Therefore, in assigning a breach of a covenant for quiet enjoyment, it is sufficient to allege, that at the time of or before the demise to the plaintiff A. had lawful right and title to the premises, and that having such lawful right, &c. he entered, &c. without shewing A.'s title, or that he evicted the plaintiff by lawful process. (f)

But in an action of covenant where the breach assigned was

(s) *Rice v. Shute*, 5 Burr. 2613.

(a) *Chappell v. Vaughan*, 1 Sid. 420.
Eccleston v. Clipsham, 1 Saund. 153.
Vernon v. Jefferies, 2 Str. 1146. *Graham v. Robertson*, 2 T. R. 282. *Addison v. Overrend*, 6 T. R. 766.

(b) *Dundas v. Lord Weymouth*, Cowp. 665. *Price v. Fletcher*, Cowp. 727.

(c) *Hoar v. Mill*, 4 M. and S. 470.
Arnould v. Revolt, 1 Brod. and Bing. 443. *Swallow v. Beaumont*, 2 B. and A. 765. *Morgan v. Edwards*, 6 Taunt. 394. *Pool v. Court*, 4 Taunt.

700. *Pitt v. Green*, 9 East. 188. *Ankerstein v. Clark*, 4 T. R. 616. *Wilson v. Gilbert*, 2 B. and P. 281. *Burbig v. Jakes*, 1 B. and P. 225.

(d) *Polyblank v. Hawkins*, Doug. 329. *Took v. Glasscock*, 1 Saund. 250. *Catlin v. Milner*, 2 Lutw. 1421.

(e) *Winn v. White*, 2 Bl. 840.

(f) *Foster v. Pierson*, 4 T. R. 617. *Rashleigh v. Williams*, 2 Vent. 61. *Wootton v. Hele*, 2 Saund. 177. *Leigh v. Gotyer*, Cro. Jac. 444. *Broking v. Cham*, Cro. Jac. 425.

that the defendant had not used a farm in a husbandlike manner, but on the contrary had committed waste, &c., to which the defendant pleaded that he had not committed waste, &c. but used the farm in a husbandlike manner, and issue was taken upon this; the plaintiff could not give evidence of any unhusbandlike treatment of the farm not amounting to waste, for the issue was narrowed to this point. (*g*)

Where A. demises to B. who assigns to C., and C. to D., and B. has covenanted for quiet enjoyment with C. and his assigns; D. may maintain covenant against B. on being ejected by A. on a forfeiture made by B. before his assignment to C. But if D. has converted the premises into pleasure grounds, and erected buildings thereon after the assignment, he certainly cannot recover the value of the improvements from B., unless he state the special damage in his declaration; and it is questionable whether he could do so even then. (*h*)

Where (*i*) the plaintiff shewed that the lands were duchy lands, and that the king demised to A. for fine and rent, by reason of which he could not enjoy; it was held that the plaintiff need not allege entry by A., for the lease might be by bargain and sale; and, if material, the defendant may plead the special matter. So where (*j*) the action is brought against the covenantor himself, his heirs, executors, or administrators, it is sufficient to allege any entry, whether tortious or otherwise, because any entry is a disturbance: but in this case some particular act of interruption must also be stated. (*k*)

Where (*l*) the covenant is that the lessor was then lawfully seized in fee, or that he had good right, full power, and lawful authority, the breach may be as general as the covenant; at all events, if the defendant plead *non est factum*, the declaration is made good, for he thereby confesses the breach.

(*g*) *Harris v. Mantle*, 3 T. R. 307.

(*h*) *Lewis v. Campbell*, 3 B. Moore 35.

(*i*) *Cloak v. Hooper*, 3 Keb. 162, 202.

(*j*) *Lloyd v. Tomkins*, 1 T. R. 671. *Crosse v. Young*, 2 Show. 425. *Forte v. Vines*, 2 Roll. Rep. 21. *Core's case*, 1 Roll. Abr. 430. F. N. B. 342. K.

(*k*) *Anon. Com. R.* 228. *Frances's case*, 8 Rep. 91. a. b.

(*l*) *Muscot v. Ballot*, Cro. Jac. 369. *Bradshaw's case*, 9 Rep. 60. b. *Lancashire v. Glover*, 2 Show. 460. *Glinister v. Audley*, Tho. Raym. 14. See also *Butler v. Swinnerton*, Palm. 339. *Hurd v. Fletcher*, Dougl. 43. *Hammond v. Hill*, Com. Rep. 160.

It is a general maxim of law that torts die with the person: where, (m) however, the covenant was, that the lessee should enjoy during the term without the interruption of the lessor or his wife, and the baron expelled the lessee and died, it was held that, although the baron was a mere *tortfeasor*, the action was well brought against the wife, his executrix and survivor, on the ousting of the baron, because she was within the words of the covenant.

In covenant for the payment of rent the precise sum is immaterial, because the recovery is in damages; therefore, the breach may be stated generally, and the damage may be given in evidence how many rent-days the rent is in arrear. (n)

Where (o) in an action of covenant there was an indenture of demise of a coal-mine, reserving one-fourth of the coal raised, or the value in money, at the election of the lessor; and if such one-fourth should fall short of the sum of 400*l.*, then reserving such additional rent as would make up such annual sum, to be rendered monthly, in equal portions; it was held that the lessor, having elected to take the whole in money, might declare for two years and three months in arrear: but even, if the money had been reserved annually, the plaintiff might have remitted the three months, and entered up judgment for the two years' rent only. (p)

An action of covenant lies against the assignee of a lease for part of the rent, because the action is brought on a real contract in respect of the land; therefore, in case of eviction, the rent is apportionable. But as between lessor and lessee the action is personal on the privity of contract, and like other personal contracts it is not apportionable. (q) If, therefore, the lessor demand only a part of the rent, he must shew how the rest has been satisfied. (r)

In covenant for arrears of rent against an executor, it shall be intended after verdict that the arrears were due in the lifetime of the testator, if the action is brought in the *detinet*

(m) *Penning v. Plat*, Cro. Jac. 383. 814.

(n) *Farrer v. Snelling*, 1 Roll. Rep. 385. *Smyth v. Conyers*, 1 Keb. 490. 575. Bro. Contr. pl. 14. Moor. 116.

(o) *Buckley v. Kenyon*, 10 East. 189. Finch. L. 2. b. c. 18.

(p) *Ingledeu v. Crips*, 2 Ld. Raym. 137. (r) *Bailey v. Hughes*, Cro. Car.

only.(s) But to a count in covenant, charging executors for breaches by their testator, who had covenanted for himself, his executors and assigns, may be joined another count charging that after the testator's death and their proving the will, and during the term, the demised premises came to one D. against whom breaches were alleged, and concluding so that neither the testator nor the defendant after his death, nor the said D. had since the assignment, kept the said covenant. *Plene administraverunt* may be pleaded to both counts, because the testator's funds are liable for any breaches by himself, his executors or assigns. (t)

If in covenant for not repairing the covenant contains an exception of casualties by fire, it is fatal on *non est factum* pleaded to have stated the covenant absolutely; and the defect cannot be amended. (u)

It is not material whether the covenants become void before action brought, if there was a breach before they became void, because the right of action remains. (x)

In the case of covenants not running with land, where the covenantee is dead, the action for the breach must be brought in the name of his executors, or administrators, in whom the legal interest in such covenants is vested. (y) But, in covenants running with the land, the executor cannot sue even for a breach in the life of his testator, without shewing some special damage to the latter: but the action must be brought in the name of the heir or devisee. (z)

An action of covenant does not lie on the stat. 3 W. and M. c. 14. against the devisee of land for a breach of covenant by the devisor; but the remedy on that statute is confined to cases where debt lies: and though the statute mentions specialties as well as bonds, yet it must be intended of such specialties as give an action of debt. (a)

If performance be pleaded, it must be pleaded in the words

(s) *Stephenson v. Stephenson*, 1 Sid. 375.

(t) *Lady Wilson v. Wigg*, 10 East. 313. *Lyddal v. Dunlap*, 1 Wils. 4.

(u) *Browne v. Knill*, 2 Brod. & B. 395.

(x) *Hill v. Pilkington*, Cro. Eliz. 244.

(y) Com. Dig. Cov. B. *Webb v. Russel*, 3 T. R. 393. *Stokes v. Russell*, *ib.* 678.

(z) *Kingdon v. Nottle*, 4 M. and S. 53. *Jones v. King*, *ib.* 188. 5 Taunt. 418. *Kingdon v. Nottle*, 1 M. and S. 355.

(a) *Wilson v. Knubley*, 7 East. 128.

of the covenant, or otherwise it will be bad on general demurrer. (b)

Covenant lies for breaches before bankruptcy, because unliquidated damages cannot be proved under the commission. (c) So it has been said, if a man be bound in a certain sum for the breach of covenants, and he break covenants before he becomes bankrupt; or if a lessee be bound to pay a penalty for ploughing meadow ground, and he does so; the lessor may sue him for the penalty, because it cannot be proved under the commission. (d)

Nil debet is a bad plea in covenant, because it confesses the breach, and only goes in mitigation of damages. *Riens in arriere* is of the same nature: (e) for the same reason also acceptance of rent from the assignee is no bar in covenant, although it is to action of debt. (f) A tender may be pleaded: but then a tender admits the special contract; and, therefore, it is not open to the defendant afterwards to deny it. (g) On this ground *non est factum* and tender are repugnant. So also the plea of assignment over is inconsistent with *non est factum*. (h) Eviction is a good plea in bar even of a covenant for rent of tithes: (i) but where (j) the plaintiff counted of an indenture of lease of the parsonage of D., and the defendant pleaded that before any rent day incurred the ordinary sequestered the parsonage for the nonpayment of first-fruits, this was no plea, because it did not shew any act of the plaintiff in his default, nor did it confess and avoid the interest of the lessor.

Where (k) A. leased to B. certain lands reserving rent, and a stranger covenanted with A. that B. should pay the rent for the farm and occupation of the lands; although this was a collateral covenant, yet in an action against the stranger it was held he might plead the eviction of B. before the rent became due, because the farm and the occupation of B. was the consideration.

(b) *Scudamore v. Stratton*, 1 B. and P. 455.

(c) *Ludford v. Barber*, 1 T. R. 94.

(d) *Goddard v. Vanderheyden*, 3 Wils. 270.

(e) *Hare v. Saville*, 1 Brownl. 19.

(f) *Arthur v. Vanderplank*, 7 Mod. 198. *Orgill v. Kempshhead*, 4 Taunt. 642.

(g) *Cox v. Brain*, 3 Taunt. 95. See *Taylor v. Needham*, 2 Taunt. 278.

(h) *Orgill v. Kempshhead*, 4 Taunt. 459.

(i) *Dalston v. Reeve*, 1 Lord Raym. 77.

(j) *Jekyll v. Lynne*, Hetl. 54.

(k) *Beadle's case*, 3 Leon. 159.

In covenant for seven quarters' rent a plea shewing a surrender in the last four of the seven quarters is bad, because it does not go to the whole breach; and the breach is not so entire that part cannot be proved where it is composed of divisible portions of rent. (*l*)

Where, (*m*) on a covenant to repair, the breach assigned was that the house fell down on such a day, and the defendant pleaded that the house was burnt down on that day, but that the plaintiff entered the day after *et adhuc extra tenet*, so that the defendant could not repair; the action was held to have attached, and the plaintiff's entry was no suspension; the judgment, therefore, was given for the plaintiff.

It is a breach of a covenant to repair, if the defendant do positive acts of mischief, such as breaking a door through a wall, just as much as if he permits the premises to decay. Neither is the right of action waived by subsequent acceptance of rent; and after notice it is a continuing breach. (*n*)

If a house be burned down, and the lessor rebuild it, he is notwithstanding entitled to his action on a covenant to repair; and the house being rebuilt is no answer to the action. (*o*) And if the covenant be that the lessee shall repair, sufficient timber being allowed, it shall be intended that he has the necessary permission to cut: but, if there is not sufficient timber, he may shew it. (*p*)

If the covenant be to repair several distinct premises, an expulsion from some of them is no excuse. (*q*) So where (*r*) the covenant was to build a house in the first ten years of the term, and the lessee assigned over, and in covenant against the assignee he pleaded that the lessor entered and had possession during part of the ninth year; it seems this is no plea, unless the lessor hindered him from building. But an eviction by title paramount is a good plea, as well to a covenant to repair, as to a covenant to leave in repair at the end of the term. (*s*)

(*l*) *Barnard v. Duthy*, 5 Taunt. 27.

(*m*) *Poole v. Archer*, 2 Show. 401.

(*n*) *Doe d. Vickery v. Jackson*, 2 Stark. N. P. C. 293.

(*o*) *Walton v. Waterhouse*, 3 Keb. 40.

(*p*) *Lord Chesterfield v. The Duke*

of Bolton, Com. B. 627.

(*q*) *Staughton v. Green*, 2 Keb. 858.
Hodgkin v. Queenborough, Willes 129.

(*r*) *Barker v. Flatwell*, Godb. 69.

(*s*) *Andrews v. Needham*, Cro. Eliz.

656.

In covenant on a breach that the house demised was not in repair, a plea that the plaintiff agreed that the defendant should employ a person four days in and about the repairing of the house, which should be a sufficient satisfaction, and that he had employed a workman four days, was held to be a bad plea; because the defendant was obliged to do the repairs by the original covenant. (t) But if the plaintiff declares on a general covenant to repair, and assigns a breach, *per quod* he was put to expense; it is sufficient for the tenant to plead performance as to all, except the repairs of a party wall, and that those repairs were rendered necessary, and done under the stat. 14 Geo. II. c. 78., and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent. If the plaintiff is possessed of any facts to charge the defendant with a proportion of such repairs, he must state them in his replication. (u)

Where two covenants in a deed have no relation to each other, the nonperformance of one cannot be pleaded in bar of an action for the breach of the other; for the damages in the one case may not be at all adequate to the damage in the other. (x) But if the landlord is bound in law or equity to repair, and the tenant is obliged by a sudden accident to make those repairs to prevent further mischief, he may set them off as money paid to the use of the landlord; and a court of equity will not interfere. (y)

A release of all debts, duties, and demands, will not discharge a covenant to repair: but a release of all covenants might have that effect. (z) So an accord executed is a good discharge of damages, but not of a covenant. (a) It has however been said that accord and satisfaction by deed will operate as a release of a covenant when it is broken. (b) The accord, so far as it is requisite to satisfy a single breach of covenant, is good by parol, because it is a bar only *pro tempore*, and not a perpetual bar to the covenant; and the distinction taken is where a duty certain accrues by a deed at the making of the writing, as by covenant, bill, or bond to pay money; there it is of the essence of the deed,

(t) *Adams v. Tapling*, 4 Mod. 88.

(u) *Moore v. Clark*, 5 Taunt. 90.

(x) *Thomas v. Cadwallader*, Willes 496. *Burroughs v. Hayes*, Comb. 21. *Weigall v. Waters*, 6 T. R. 488.

(y) *Weigall v. Waters*, 2 Anstr. 575.

(z) *Hancock v. Field*, Cro. Jac. 170.

(a) *Alden v. Blague*, Cro. Jac. 99.

(b) *Robards v. Stoker*, Palm. 110.

See Al. 39.

and therefore must be avoided by matter of as high a nature: but when no certain duty accrues by the deed, but a tort subsequent in conjunction with the deed gives an action for damages, then accord by parol with satisfaction is a good plea. (c)

In *Cordwent v. Hunt*, (d) the plaintiff as tenant of a farm covenanted with the landlord to fetch and bring all the timber, stone, and other materials, that should at any time during the continuance of the term be wanted about the erecting of a threshing mill; and the latter covenanted to build and erect the same. The defendant pleaded that he began to provide the necessary materials for erecting the mill; and that, whilst he was so doing, the plaintiff desired him not to do the same, but to refrain from so doing till he should be requested by the plaintiff: and, secondly, a licence; on special demurrer, these pleas were held bad, since the transactions pleaded, being by parol, amounted neither to a release, accord, nor satisfaction.

Where (e) an action was brought against executor of tenant for life for the breach of a covenant to repair in the life of his testator, and the defendant pleaded that after the death of his testator it was agreed that he should quietly leave the premises, in consideration of which he should be discharged of the breach in not repairing, this concord was held to be void; (for want of reciprocity according to *Fenner J.*, because the executor had no interest in the house, and had only a licence in law to carry off the goods) but the others held that if the time for leaving the house had been alleged in certainty, as for example to depart instantly, the concord might have been good.

In an action for breach of a covenant not to alien the premises without licence in writing, the lessee may plead a licence in writing without shewing it: for no interest passes thereby, and perhaps the assignee may have it to protect his estate. (f)

The plea of outlawry of the lessor is no plea in bar to an action on a covenant to repair, because the damages are uncertain, and therefore they could not be forfeited by the outlawry. Therefore where an action of covenant was brought for non-payment of rent, and also for not repairing, the outlawry of the

(c) *Blake's case*, 6 Rep. 43. 1 Vin. S. C. 1 Danv. Abr. 240. pl. 17. Abr. 130.

(f) *Walker v. Ballamy*, Cro. Jac.

(d) 2 B. Moore 660.

102.

(e) *Sanford v. Cutcliffe*, Yelv. 124.

lessor was no answer, for it went to the whole declaration; and, although it might be a bar to the rent, it could not be so to the damage for not repairing; and since it was entire, it was good for neither demand. The defendant in such a case might before imparlance plead the outlawry in abatement, or he might plead it in bar of the rent, and in abatement to the repairs. (g)

In covenant by the assignee of lessor against the lessee or his assignee, the title of the assignee is material and traversable: but any estate which satisfies the substance of the issue will enable the plaintiff to recover. The words "*modo et forma prout,*" &c. are mere matter of form. (h)

A right of action on a breach of covenant not secured by a penalty, and where the damages to be recovered are uncertain, is not bound by the certificate of a defendant who becomes a bankrupt after the breach of the covenant. The demand being an uncertain debt could not be so discharged. (i)

Where (k) an action of covenant was brought by the assignee of a term against the executor of the lessor for a breach of a covenant for quiet enjoyment, it was held that satisfaction from the assignor of the term was no bar to an action against the executors, for the satisfaction was on different covenants.

If the declaration state the defendant as assignee of all the estate in the premises, and it appears that he is assignee only of part, it will be a fatal variance. (l) As the plaintiff however cannot be supposed to be cognisant of the defendant's title, it is sufficient to allege generally that the defendant is assignee without shewing *quo jure*; and therefore, in an action on the covenant for quiet enjoyment, evidence that the defendant is entitled as heir will support a declaration charging him as assignee. (m) And when the action is brought against defendant as assignee of a term, it will be enough to give general evidence, from which an assignment may be inferred, as possession or payment of rent; and it lies on the defendant to rebut the presumption. (n)

Where (o) the covenant was that the lessee at Michaelmas,

(g) *Clerke v. Scroggs*, 2 Lutw. 1510.

(h) *Carvick v. Blagrove*, 1 Brod. and Bingh. 531.

(i) *Bannister v. Scott*, 6 T. R. 489.
Goddard v. Vanderheyden, 3 Wils. 262.

(k) *Whitway v. Pincent*, Styl. 300.

(l) *Hare v. Cator*, Cowp. 766.

(m) *Derisley v. Custance*, 4 T. R. 75.

(n) *Hare v. Cator*, *supra*.

(o) *Hingn v. Payn*, Cro. Jac. 475.

being the end of the term, or after, on request would deliver up the possession to the lessee or his assigns, and the lessor before the end of the term had by deed enrolled bargained and sold the reversion to J. S. and J. D.; and the breach assigned was that J. S. and J. D. the next day after Michaelmas day came to the house, and required the lessee to deliver possession which he had not done, and thereupon issue was joined; it was held that a demand by one would support the issue, both claiming under the same title: so a delivery to one would have been a delivery to both.

If the issue joined between the parties be whether the defendant built houses by a certain day, and according to his covenant, evidence that he completed them before a later day, to which the parties afterwards agreed to enlarge the time by parol, will not support the issue. (*q*)

In covenant for rent upon a lease from A. to B., where the issue was whether C. (whose title both admitted) demised first to A., or to another person, C. was held to be a competent witness to prove the point in question: for the verdict could not be given in evidence for him in any other action, it being a record between other parties. (*r*) So, in an action at the suit of the lessor against the lessee for not cultivating a farm according to the covenants, a sub-lessee is a competent witness for the defendant. (*s*)

In covenant for payment of rent, the sum being certain, it is now the usual practice, where the judgment is by default or on demurrer, to refer it to the master to compute what is due, which may be done by him as well as by a jury, and that without putting the parties to the expense of a writ of inquiry. (*t*) So, if an action be brought for nonpayment of rent and not repairing, on motion to bring so much rent into court, it may be referred to the master, and process staid as to that. (*u*)

Where (*x*) an action of covenant had been brought in London for not repairing hedges, and for not ploughing lands in Herts, a writ of inquiry of damages to the sheriff of London was held to be good, because the covenant was made there.

(*q*) *Little v. Holland*, 3 T. R. 590.

1 Salk. 596.

(*r*) *Bell v. Harwood*, 3 T. R. 308.

(*u*) *Anon.* 1 Wils. 75. *Pawlett v.*

(*s*) *Wishaw v. Barnes*, 1 Campb. N. P. C. 341.

Heathfield, 12 Mod. 95. *contra*.

(*x*) *Smith v. Batten*, Cro. Jac. 142.

(*t*) *Byrom v. Johnson*, 8 T. R. 410.

Where (y) the covenant is by the lessee for himself and his executors, and his executors are sued as executors on a covenant to repair, the judgment can only be *de bonis testatoris*, although the house has been burned down by the negligence of the executors. So where (z) the plaintiffs sued as executors on a covenant to provide timber for the repair of the demised premises, upon a demand made after the death of their testator; it was held they were not liable to pay the costs of a judgment as in the case of a nonsuit; because, though the breach happened in their own time, they could only declare on the contract made by their testator.

Where (a) freehold premises are on lease, and the reversion is limited to A. for life, with remainder over in tail or in fee, on a breach of covenant A. can recover damages commensurate only with his estate, and the remainder man may have his action for the injury to the inheritance. So also the grantee of the reversion can recover damages for want of repair only from the time of the grant. If the lessee repair pending the writ, although the suit do not abate, yet it will qualify the damages. (b)

Where (c) in covenant against the lessee upon a lease, reserving an increased rent for every acre of meadow converted into tillage, the jury by their verdict had given damages instead of the increased rent, the court said that the verdict was erroneous, although it might be consistent with the justice of the case; and therefore granted a new trial; and, secondly, the judge having expressly directed the jury to find damages to the amount of the increased rent, the court granted the new trial with payment of costs.

Where (d) a lessor had covenanted for quiet enjoyment, and devised his estate in trust for payment of debts, and the lessee after eviction recovered against the executors; it was held on a bill in Chancery against the executors for an account, that this being a specialty debt should bear interest.

In some cases the lessor may have a preventive remedy in

(y) Dy. 324. a.

(z) Cooke v. Lucas, 2 East. 395.
Tattersall v. Groote, 2 B. and P. 255.

(a) Evelyn v. Radish, 1 Holt N.P.C.
543.

(b) 3 Leon. 51. pl. 72.

(c) Farrant v. Olmius, 3 B. and A.
692.

(d) The Earl of Bath v. The Earl of
Bradford, 2 Vez. 587.

equity to restrain by injunction the breaches of covenant. Where (e) the lessee for instance covenanted to spend all the hay and manure on the premises, the court is said to have granted an injunction to restrain the breach of this covenant. In another case, (f) however, it is said that the carrying off straw and manure is only a breach of contract; and that the remedy by injunction before answer is only to be granted where the injury is irreparable, as where the tenant threatens to plough antient meadow, which on the face of it is waste.

It is clear that in such a case as the one last mentioned equity would interfere. Equity will also interfere to restrain the breaking up of lands into tillage, which have been laid down in grass, when it is contrary to any express covenant to that effect, (g) or even upon a covenant to manage the farm in a husbandlike manner. (h)

These are cases of express covenants: but the analogy does not hold in the case of implied agreements, where the remedy at law is not by action of covenant. As for instance where a tenant after the expiration of his term holds over, which *prima facie* is a holding upon the terms of the original lease. In such a case no action of covenant would lie: but the landlord might bring an action on the case, declaring specially on the implied agreement, with an averment that the plaintiff was ready to perform his part. Lord Eldon said, that on such implied agreements there would be considerable hazard of impeding a man in the exercise of his right, if the court were to act by reference to those cases in which there were express covenants: although at the same time his lordship admitted that payment of rent at the same period is evidence of holding not only on the same terms, but further subject to the same covenants and agreements; even if there is a course of husbandry provided by the lease running through one or two years. (i)

Where (k) a tenant defending an ejectment brought by his landlord makes default at the trial, and uses the interval to do all

(e) *Grant v. Lord Belfast* in Ch. 6 Ves. 106.
1796.

(h) *Drury v. Molins*, 6 Ves. 328.

(f) *Johnson v. Goldswaine*, 3 Anstr.

(i) *Kimpton v. Evc*, 2 Ves. and B.

749. *Longman v. Calliford*, 3 Anstr.

352.

645.

(k) *Lathropp v. Marsh*, 5 Ves. 259.

(g) *Lord Grey de Wilton v. Saxon*,

the mischief he can by breaches of covenant and wilful waste; the court will grant an injunction on motion, or in vacation by petition: but it has refused it, where no ejectment has been brought.

Where, (l) after service of a writ of injunction, the defendant disobeyed the order of the court, it was ordered on motion and affidavit that on a personal notice of motion to the wife of the defendant, he should stand committed for the breach of the injunction; and the service of the notice of motion on the wife on the demised premises was deemed good service.

Common covenants in husbandry cannot be decreed to be specifically performed in equity. Therefore a demurrer has been held to lie to a bill for specific performance of such covenants, as to repair hedges after the expiration of the lease, and for an account of loppings cut, and dung removed by the tenant. (m) So the specific performance of a covenant to make good a gravel pit has been refused. In this case complete justice might be done at law: but specific performance is decreed only where the party cannot be satisfied any other way. (n) But courts of equity will decree a specific performance of covenants to rebuild. (o) And recently the court decreed the execution of a covenant to build a house of an elevation corresponding to the surrounding houses. (p)

Equity will not interfere to interpret the reasonableness or unreasonableness of covenants; therefore where, (q) in a lease of lands renewable for ever, the lessee covenanted that he and his heirs should with all their family live on the premises, during the continuance of that and every other lease, and whenever they should fail so to do, an additional rent should become payable with the usual remedies by distress and entry to compel payment; this was held to be properly triable at law, where the unreasonableness, illegality, or waiver, of such a covenant were proper questions. Again where (r) the lessee covenanted not to plough any

(l) *Pulteney v. Shelton*, 5 Ves. 260. n.

512. *Belt's Suppl. to Vez.* 15.

(m) *Bayner v. Stone*, 2 Eden 128.

(p) *Franklyn v. Tuton*, 5 Madd.

(n) *Flint v. Brandon*, 8 Ves. 159.

Ch. Ca. 469.

Errington v. Aynesley, 2 Bro. Ch. Ca. 341.

(q) *Ponsonby v. Adams*, 2 Bro. P. C. 431. Toml.

(o) *Allen v. Harding*, 2 Eq. Abr. 17.

(r) *Rolfe v. Peterson*, 2 Bro. P. C.

The City of London v. Nash, 3 Atk.

436. Toml.

ancient meadow, and if he did to pay an additional rent of 5*l.* an acre; this additional rent not being a penalty, but a liquidated satisfaction fixed upon by the parties, equity could not interfere to restrain an action for the recovery of it.

In the case of *Smith v. Morris*, (s) however, the lessee of a colliery, which became no longer worth working, offering to pay for all the coal that could be got, was relieved against the future rent, and the covenant to work the colliery on condition that the plaintiff should surrender the lease. The master of the rolls admitted that if parties enter into legal contracts, they are bound to fulfil them: but if such contracts were enforced for the purpose of vexation, equity might properly interfere. So where, (t) in a lease of a house adjoining Vauxhall gardens by the proprietors of the gardens, there was a covenant not to carry on the trade of a victualler, retailer of wines, and several other trades therein specified, nor generally any employment to the injury of the proprietors; although the court in the first instance granted an injunction to restrain the breach of this covenant, in the nature of specific performance; yet, on the answer coming in, it appeared that the proprietors knew the purpose for which this house was taken, went over it with surveyors, recommended tables to be put up for the accommodation of customers, and consented to round off some of the palings in order to make the house more public. Also after the house was opened, the lease not having been executed, the tenant refused to execute it with the covenant in question, unless the proprietors would consent that the trade he carried on should not be considered a breach of covenant; and a memorandum to that effect was prepared and signed; and then the lease was executed, and the business was carried on for several years. It was denied moreover by the defendant that the house was resorted to by persons from the gardens, it being chiefly frequented by hackney coachmen, mechanics, &c. Upon these circumstances the court therefore, so far from continuing the injunction, rather doubted whether a bill might not be brought to prevent the lessors from suing on this covenant at law.

So, although it be generally true that equity will not decree a

(s) 2 Bro. Ch. Ca. 314.

(t) *Barrett v. Blagrave*, 5 Ves. 555.
6 Ves. 104.

specific delivery of chattels, where compensation may be made in damages ; yet where (u) the plaintiff held a farm of the defendant on a lease for seven years, at the rent of 1000*l. per annum*, and it was agreed that the defendant should make advances to enable the plaintiff to cultivate the farm to the extent of 500*l.*, for which sum it was agreed he might be in arrear, and if the arrears should be at any time above that sum, the landlord should be at liberty to enter and sell all the cattle, crops, and personal estate on the premises, and disputes having arisen between them, the defendant entered upon the farm and took possession of the stock, with a view of putting his remedy in force by a bill of sale ; upon which the tenant brought the bill for an injunction and a restitution of the stock and effects : the court interposed in this case. The circumstance, it was observed, of a trust by way of deposit was not required in this instance to furnish the principle on which the court might be compelled to interpose ; (x) for the law would make the defendant a trustee, and by the express contract he would be so. The simple ground of this bill was that the tenant had bargained for the enjoyment of the farm for the purpose of agriculture, and for the enjoyment of the stock for seven years ; for that must be the effect of the stipulation, to be debtor to his landlord during the term, who might otherwise lay hold of it for rent, and under the bill of sale for other money due : and he was debtor on both accounts. There was no doubt that at the hearing, if the landlord had appeared to have entered without right, the court would have restored the estate for the remainder of the term ; and, finding the same person in possession of the stock under the same wrong, would have undoubtedly decreed him to account for and deliver the whole. In this case the bill proceeded on the ground that, when the defendant took possession, the plaintiff did not owe upon all accounts the money stipulated ; and the court interfered because neither the defendant nor his agents would make no distinct affidavit that the particular sum in question, or what sum, was due. His right to take possession of these chattels depending on the same question as his right to take possession of the farm, the court would not do justice by permitting him to dispose of the stock. He was trustee of both : it was an entire

(u) *Nuthbrown v. Thornton*, 10 Ves. 159.

(x) *Fells v. Read*, 3 Ves. 70. *Arundell v. Phipps*, 10 Ves. 189.

contract, and the enjoyment of the chattels was requisite to the enjoyment of the estate.

Where there is a covenant in a lease that if the lessor shall be minded to set out part of the premises for a street or streets, or to set or sell any part to build upon, he may resume on certain terms; if the lessor resume *bond fide* with the intention to build, though that intention cannot be acted upon, yet there is no equity for the tenant. In one case (y) the land resumed was wanted for the purposes of a canal company; therefore, warehouses and wharfs were considered within the meaning of the covenant; and the lessee was allowed a compensation for the land covered with water. As to towing-paths and the banks of the canal basins, although strictly subjects of compensation, the court would not allow a reference to the master on that account.

It seems to be a question whether a Court of Chancery can relieve by allowing an equitable set-off to a demand for rent. The policy of the law does not permit a set-off against a distress for rent; where, therefore, the claim of set-off is founded on a legal demand, a court of equity must follow the law. (z)

To support a bill of interpleader by a tenant, the two parties must claim the same rent in privity of tenure and contract, as in the case of mortgagor and mortgagee, trustee, and *cestui que trust*. (a) So a bill of this nature may be filed in any case where the landlord by his own act subsequent to the demise gives title to another: (b) but where (c) one claims a certain rent, and another claims unliquidated damages for use and occupation, the tenant cannot make them interplead.

Where (d) the tenant filed a bill against several sets of annuitants who had distrained for rent, it was referred to the master to settle the priorities of the annuitants: but the tenant was held clearly entitled to his costs out of the rents paid in; and that without waiting the event of the suit, because the idea of an interpleader presumes the right of the plaintiff to be paramount to the rights of the interpleading parties.

(y) *Gough v. The Worcester and Birmingham Canal Company*, 6 Ves. 354.

(z) *Townrow v. Benson*, 3 Madd. Ch. Ca. 203.

(a) 2 Ves. J. 312.

(b) *Cowtan v. Williams*, 9 Ves. 107. *Clarke v. Byne*, 13 Ves. 383. Mitf. Tr. Pl. 47.

(c) *Johnson v. Atkinson*, 3 Anstr. 798. *Smith v. Targett*, 2 Anstr. 529.

(d) *Angell v. Haddon*, 16 Ves. 202.

In conclusion something should be said of bonds for the performance of covenants. In the old cases a great deal of doubt seems to have prevailed as to the point, whether rent should be demanded previous to suing on a bond for the payment of it. It seems, however, to be the better opinion, that if a lease contains no express covenant for the payment of rent, but the bond be to observe the obligations and agreements of the lease generally, there the nature of the rent is not altered, so as to do away with the necessity of a demand previous to suing on the bond: but if there is an express covenant to pay the rent, or if the bond expressly mention the payment of rent as part of the condition, there the nature of the rent is altered so far as to render a demand unnecessary to give a right of action; but it does not so totally change the nature of the payment, as to compel the lessee to seek the lessor any where but upon the land; for the payment is still rent, and the tender must be made on the land. (e)

Where (f) one bound in an obligation to the Queen sold his land, and the purchaser made a lease for years rendering rent, and the lessee was bound in an obligation to pay it, and then the land was extended; it was held that the condition of the bond was saved, because the crown came in by title paramount. So, if part only had been extended, the residue only need have been paid to the lessor.

The bond is only co-extensive with the lease; therefore, if the lease by any means is determined, the bond is *functus officio* with it. Where, (g) however, the condition of the bond was to pay 10*l.* yearly to a stranger for seventeen years, the period or term demised, and the lessee surrendered, the lessee was nevertheless bound to pay the 10*l.*, because his estate was *in esse* as to the stranger, and he might have enjoyed if he had chosen to do so.

In debt on obligation to save harmless against rent claimed by a stranger, the proper plea is not that the rent is not due, but that the obligee has not been damnified: (h) but if the defendant

(e) *Andrews v. Wood*, Cro. Eliz. 332. *Baker v. Spain*, Vin. Abr. Cond. 264. pl. 10. S. C. Hob. 8. S. C. 1 Brownl. 76. Anon. Godb. 95. *Polson v. Warren*, Palm. 490. *Chapman v. Chapman*, Cro. Car. 76. S. C. Hutt. 90. *Specot v. Sheres*, Cro. Eliz. 629.

Specket v. Shore, S. C. Moor. 636.

(f) *Sir W. Peckham's case*, Sav. 132.

(g) *Ford v. Hollingborough*, Cro. Eliz. 313.

(h) Sav. 90.

plead he has exonerated and kept harmless, he must shew how, which is not necessary in a plea of *non damnificatus*: (*k*) for the one is a negative, and the other an affirmative issue.

If the lessee for years be bound to deliver up possession to the lessor, his heirs or assigns, at the end of the term, and the lessor bargains and sells the reversion, the lessee is bound to take notice of such assignment: and, if he refuse to deliver the possession to the assignee of the reversion, the bond is forfeited thereby. (*l*) So if the reversion be sold to two, and one demands the possession, the bond is forfeited. (*m*)

In an action on a bond for the performance of covenants after a breach, judgment in covenant, and a suggestion of damages to be assessed on a writ of enquiry by a jury, need not be proved. (*n*) So if the lessor be bound in an obligation for title or quiet enjoyment, and the plaintiff reply *nil habuit in tenementis* to a plea of performance, it is well assigned without setting forth an actual eviction. (*o*)

The jurisdiction of courts of equity on penalties is of very high antiquity. The legislature now has afforded the same benefit to defendants in actions at law. Bystat. 8 and 9 W. III. c. 11. s. 8. it is provided, that in case the defendant after judgment entered according to the act, and before execution executed, shall pay the damages arising from breaches of covenants with costs of suit, execution may be staid; or if the defendant has been taken in execution, then on payment of such damages and costs, and the expenses of the execution, he may obtain his discharge: but that the judgment shall remain to answer any further breach, and on such further breach or breaches it may be revived by *scire facias* against the defendant, his heir, terretenants, executors or administrators. It is now settled that it is not matter of election in the plaintiff to proceed under the statute, (*p*) but that the directions of the legislature are compulsory; and he must therefore so proceed. (*q*)

(*k*) *Horseman v. Obbins*, Cro. Jac. 616.

634.

(*l*) *Poph.* 136.

(*m*) *Hingen v. Payn*, Cro. Jac. 475.

(*n*) *Calliss v. Rybot*, 1 Esp. N. P. C. 157.

(*o*) *Odingley v. England*, 3 Keb.

(*p*) St. 8 and 9 W. III. c. 11. s. 8.

Irish st. 9 W. III. c. 35. s. 8.

(*q*) *Roles v. Rosewell*, 5 T. R. 588.

Hardy v. Bern, 5 T. R. 636. *Walcot v. Goulding*, 8 T. R. 126.

V. The action of waste lay, at the common law, against tenant by the curtesy, tenant in dower, and guardian in chivalry, because these were estates created by law: but it did not lie against lessee for life or years, or any tenant by grant or contract, because it was supposed that the grantor could provide against the commission of waste by the terms of his grant. (r) The statute of Gloucester (s) at length gave this action against the lessee for life or years, and also against their assignees for waste done during their enjoyment of the estate. (t)

By the stat. 11 Hen. VI. c. 5., where tenants for life or years assign their estates, and continue in possession, and take the profits and commit waste, an action of waste may be brought against them in those cases, where they were punishable for waste before assignment over.

If the lessee for years assign one moiety to one person, and the other moiety to another, although one of the assignees only commit waste, yet the action shall be brought against both. So if the lessee underleases, and the underlessee commit waste, the action shall be brought against the lessee for the whole. (u)

No waste will lie against an executor for waste done in the life of his testator, because, being a tort, the right of action is extinguished with the person committing the tortious act. (v)

An executor *de son tort* of a term is liable to waste; and, if a recovery be had against him, the rightful executor has his remedy against the executor *de son tort*: but he has none against the recoveror; and this is said to be no hardship to the creditor, because it is a *devastavit* in the executor *de son tort*. (x)

No action of waste lies against the tenant at will for permissive or voluntary waste: but if he commit voluntary waste, a general action of trespass will lie against him, because such acts amount to a determination of the will, and the lessor shall have trespass without entry. (y)

If a lessee for years bequeath his term, and then the executor commits waste, and then assents to the bequest, waste will, not-

(r) 2 Inst. 300.

(s) Stat. 6 Ed. I. c. 5.

(t) Sanders v. Norwood, Cro. Eliz. 683.

(u) 1 Brownl. 237.

(v) 2 Roll. Abr. 828. pl. 7. 2 Inst.

302.

(x) The Mayor of Ipswich v. Johnson, 3 Mod. 90. 2 Show. 457.

(y) Lady Shrewsbury's case, 5 Rep. 13 b. Walgrave v. Somerset, 4 Leon.

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withstanding, lie against the executor for the waste committed during the time he was in possession. (x)

If a feme tenant for life marry, and her husband commit waste, and then his wife dies, the baron is dispunishable, for the writ is *quare de communi consilio, &c. provisum est quod non liceat alicui vastum sive destructionem facere, de terris sibi dimissis ad terminum vitæ vel annorum.* (a)

The action of waste can only be brought by him who has the immediate reversion or remainder in fee, or in tail, to the disinheritor of whom the waste is alleged to be committed; therefore, an intermediate remainderman for life, at the same time that he prevents the reversioner from bringing the action, cannot have it himself; nor can any one have it who had not an estate of inheritance at the time of the waste committed: therefore, an heir cannot bring the action for waste done in the time of his ancestor. (b) But in stat. 20 Edw. I. st. 2. (c) it is ordained that every heir, whether of full age or otherwise, where the ancestor has brought waste, and dies before judgment, and the heir afterward brings waste, shall recover for the waste done in the time of his ancestor. So also, if the estate were out of the reversioner by wrong, and then he recover it back again, the law gives him the action for waste during the disseisin. (d) So in the case of a bishop after restitution of his temporalities, if the tenant holding by the demise of his predecessor commit waste during the vacancy, the succeeding bishop shall have the action, although he had nothing in the land during the time the waste was done. It has been thought that this last case was by force of the stat. of Marlebridge, c. 29. (e) against depredations on the possessions of ecclesiastical persons: but that opinion appears to be erroneous, because that statute only extended to ecclesiastical persons regular. (f)

Where (g) tenant for life was, with tenant in tail in remainder,

(x) Saunder's case, 5 Rep. 12. a.

(d) Co. Litt. 356. a.

(a) Clifton's case, 5 Rep. 75. b.

(e) F. N. B. 112.

(b) Co. Litt. 53. a. 2 Inst. 305.

(f) 2 Inst. 151. Garth v. Cotton, 1

(c) But see as to this statute which is called an ordnance, and is said to have been repealed, 2 Roll. Abr. 824. pl. 9., and the Year-book, 2 Hen. IV. 3. B.

Dick. 183. Year-books, 39 Edw. III. 15. 2 Hen. IV. 2. And 2 Roll. Abr. 8, 24.

(g) Owen's case, Moor. 220.

and the tenant in tail bargained and sold the reversion in fee, and levied a fine accordingly, and in waste the grantee stated the fine without alleging the proclamations, the court held that it should be intended that there were no proclamations; and, therefore, the grantee could not recover, because he was only tenant for the life of tenant in tail: for it was no discontinuance.

A remainder for years will not prevent the action against the particular tenant by the owner of the inheritance. *(h)* And if there be tenant for life or years, with remainder for life, remainder over in fee, and after the particular tenant has committed waste the intermediate remainderman for life dies, the reversioner may have the action of waste. *(i)* So if *(k)* tenant in fee lease for years, and then convey the reversion to the use of himself for life, without impeachment of waste, remainder over in fee; if the lessee for years commit waste, he is not punishable for it after the death of tenant for life: but if a tenant for life *sans* waste make a lease for years and die, it seems the lessee is punishable for waste done in the life of the tenant for life, because the lease for years was derived out of an estate punishable for waste.

If there is a lease for life or years with remainder to baron and feme in special tail, and the feme dies without issue, the baron cannot maintain waste. *(l)* So it seems if the estate tail be in contingency, as where it is limited to the baron and feme and the heirs of the body of the survivor, neither of them can have waste.

Regard also in this action must be had to the continuance of the reversion in the estate, that it was at the time of the waste done; for if after waste committed the reversioner grant over his estate, although he take back the whole estate, yet is the waste punishable: but if tenant in tail suffer a recovery, this does not alter the privity, because it has been solemnly determined that where the use of a recovery is declared to tenant in tail and his heirs, this is the same use and the same fee, only delivered from the restraint imposed by the statute *De donis*. *(m)* Where, however, the state of the reversion is so altered by the act of the reversioner, as to

(h) 1 Brownl. 240.

(i) Paget's case, 5 Rep. 78. b.

(k) Bray v. Tracey, W. Jon. 51.

(l) Moor. 18. pl. 64.

(m) Lord Derwentwater's case, Hil.

6 Geo. I. Abbot v. Burton, 2 Salk.

590. Martin d. Tregonwell v. Strachan,

2 Str. 4179. 1 Wils. 266. 4 Bro. P. C.

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preclude this remedy, his property in the timber severed before remains notwithstanding, and he may maintain trover for it.

The action of waste may be brought either during the term, or after the expiration of it ; and hence arises the distinction of waste in the *tenet* and in the *tenuit*. In the first case, by the statute of Gloucester, the remainderman or reversioner is entitled to recover the place wasted, together with treble damages : but in the latter damages only are the object of the suit, since the interest of the tenant in the land is at an end.

Tenants in common, if they join in making a lease, they must join in action of waste, though they claim by different titles. (n) It is said, however, to be the better opinion that, if the reversion be granted, one moiety to one person and another moiety to another in severalty, they cannot join in waste in the *tenet*, because they claim by several titles. (o)

If there are two coparceners, and one lease her moiety to one person, and the other to another, they have several actions of waste : but if both the leases come into the hands of one assignee, and one coparcener sell her share to the other, one action of waste may be brought on the two demises. (p)

Where (q) one seised in fee made a lease for life, and died, leaving his two daughters his heirs in coparcenary, and the lessee committed waste, and then one of the daughters died, leaving a daughter, and the lessee committed more waste, it was held the aunt and niece might join, and should recover the place wasted, and treble damages in their own time, and the aunt should recover treble damages for waste in the time of her and her sister.

One tenant in common cannot maintain waste against another tenant in common in possession of the whole, by a demise of a moiety from the first, for cutting trees of a proper age and growth : but, in another form of action, he is entitled to recover a moiety of the value of all the trees so cut. (r)

No action of waste lies in London by the statute : but they can bring action of waste in the hustings court by custom. (s) So

(n) *Hart v. Hill*, Cro. Eliz. 357. Eliz. 290.

Moor. 288. *Curtis v. Bourn*, 2 Mod. 61. *contra*.

(o) Moor. 40. pl. 127.

(p) *Warneford v. Haddock*, Cro.

(q) Co. Litt. 53. b. Bro. Abr. Waste, 41.

(r) *Martin v. Knowlys*, 8 T.R. 145.

(s) Bro. Waste. 20.

also it does not lie by the force of the statute in ancient demesne because in default of the grand distress (*s*) they cannot make a writ to the sheriff to inquire of the waste as the statute directs. (*t*)

Waste appears to have been considered a tortious act, before the statute of Gloucester, both by the statute of Marlebridge, (*u*) and other books, it being in derogation of the fealty which every tenant owes to his lord. By the statute of Marlebridge a prohibition lay at the common law against the tenant for life or years, as well as against tenants by curtesy, or in dower. (*x*) But by stat. Westminster II. (*y*) it is provided that there shall be no prohibition, but a writ of summons, attachment, and distress peremptory. In default of appearance on the distress the plaintiff shall have judgment and a writ of inquiry. An essoign, however, lies as *in quare impedit*; and the process shall be executed as *in quare impedit*, returnable from fifteen days to fifteen days. On default of appearance on the grand distress, the sheriff is directed to go to the place wasted, and make inquisition; and, after inquisition returned, the court shall give judgment as on the stat. of Gloucester, c. 5.

The writ must be where the land lies. The declaration in waste must shew how the plaintiff is entitled to the inheritance; (*z*) and if it be the inheritance of the wife, it must be laid, as the fact is, to the disherison of the wife. (*a*) The declaration must also state the quantity and quality of the waste: but the plaintiff need not prove the whole, because he may recover damages *pro tanto*. (*b*) Waste in trees, however, will not support an assignment of waste in land. (*c*) But where (*d*) the plaintiff assigns waste, sale, and destruction, if the jury find no sale, it is not material, if they find particular acts of waste.

The plea of *nul waste* is the general issue, which admits nothing; and, therefore, the plaintiff must prove his title as laid in the declaration, and also the kind of waste stated in it. The defendant may under the same issue give in evidence any thing which proves the acts assigned to be no waste, such as tempest,

(*r*) See as to this expression, Booth on Real Actions, 11. See also *infra*.

(*i*) Bro. Ant. Demesne 20. 2 Inst. 279.

(*u*) Stat. 52 Hen. III. c. 23.

(*x*) Bract. 217, 316.

(*y*) Stat. 13 Edw. I. c. 14.

(*z*) Co. Litt. 285. a.

(*a*) 2 Roll. Abr. 832. pl. 3. Anon. 1 Freem. 343.

(*b*) 2 Roll. Abr. 832. pl. 1, 2.

(*c*) Owen's case, Moor. 220. Moor. 73.

(*d*) Green v. Cole, 2 Saund. 259.

lightning, or the like ; (e) or that the plaintiff himself committed it. (f) So where waste was assigned in cutting ten oaks, it was held that the plaintiff might give in evidence that he merely shred and lopped them. (g) If the defendant does not confess the waste, the plaintiff is entitled to a view. (h) And if the action be for cutting down a certain number of trees, proof of a smaller number is sufficient ; for the issue is waste or no waste. (i)

Where the defendant has cut timber for repairs, and uses it accordingly, or for necessary botes, he must plead it specially. (k) So, if the lease was without impeachment of waste, or if the defendant repaired before action brought, (in which case the plaintiff is entitled to a view by the jury, (l)) or if the defendant obtained the licence of the plaintiff to cut timber, or the premises were in such a ruinous state at the commencement of the lease that the defendant could not repair them ; these are matters of justification and excuse, and therefore must be pleaded specially. If the tenant repair after action brought, it is no bar to the action. (m)

If the jury find a verdict for the plaintiff, and give damages under forty pence, it seems judgment shall be entered for the defendant on the principle of *de minimis non curat lex* ; yet waste to the damage of three shillings and four-pence is waste : and several particular wastes may amount to a sum sufficient to maintain the action. (n)

Costs were not originally recoverable in this action, but only treble damages ; because the action was by force of the statute of Gloucester : but by the stat. 8 and 9 W. III. c. 11. s. 3. (o) in all actions of waste, where the single value or damage found by the jury shall not exceed twenty nobles, the plaintiff obtaining judgment after plea pleaded, or demurrer joined, shall likewise recover his costs of suit ; and if the plaintiff be nonsuited or suffer a discontinuance, or a verdict pass against him, the defendant shall have his costs, and have execution of the same.

(e) Co. Litt. 283. a.

Danby v. Hodgson, 3 Lev. 323.

(f) Year-book, 5 Hen. IV. 2. b.

(l) Whelpdale's case, 5 Rep. 119. a.

(g) Dy. 92. a. pl. 16.

2 Inst. 306.

(h) Strode v. Osborne, 1 Show. 3.

(m) 2 Inst. 307. Dy. 276. a. 1

(i) Co. Litt. 282. a. 2 Roll. Abr.

Leon. 67.

706. tit. Vend. C. 40. 1 Phill. Ev.

(n) Harrow-School v. Alderton, 2

215.

B. and P. 86.

(k) Leigh v. Leigh, 2 Lutw. 1546.

(o) Irish stat. 9 W. III. c. 35. s. 3.

If an infant or feme covert do waste, and the lessor recovers, it will bind them, because the statute gives the place wasted. So if lessee for life make a lease for years, and then enters and does waste, the recoverer shall avoid the term. (*p*)

The action of waste has in modern times given way in a great measure to an action on the case in the nature of waste; which is considered a more useful form of action; and, although the place wasted cannot be recovered in this action, yet, as in every demise by deed, a proviso may be introduced for re-entry on commission of waste, there is in most cases little inconvenience on that account. On the other hand, it is a more convenient mode of recovering damages; and the plaintiff is in all cases entitled to his costs, which he could not always have in an action of waste. (*q*) Another advantage is that it may be brought by him in remainder or reversion for life or years, without any special covenant, by reason of the liability over to which such particular tenants are liable. (*r*) It is now the usual action for voluntary waste; and, even where the lessee has covenanted not to commit waste, the lessor has his election to bring his action on the case or on the covenant. (*s*)

An action on the case, however, for permissive waste will not lie unless the lessee has covenanted to repair. It is true that the law will raise an assumpsit from the tenant to perform all the duties which it imposes on him, although there be no covenant to do so: but that principle does not apply to declarations framed in tort, as such declarations in waste must be. So case in the nature of waste cannot be brought for not occupying in a husband-like manner. (*t*) It seems, however, that the action will lie for permissive waste, if counts are joined for wilful waste. (*u*) Again, waste can only lie for that which would be waste if there were no stipulation respecting it. Therefore, where (*v*) there was a covenant that the premises should be put and kept in the same state of repair as A. B. put them into, as it was no waste to omit keeping them in the same repair as A. B. put them into,

(*p*) Whittingham's case, 8 Rep. 44. h.

(*q*) Jefferson v. Jefferson, 3 Lev. 130.

(*r*) Jeremy v. Lowgar, Cro. Eliz. 461. West v. Treud, Cro. Car. 187.

(*s*) Kinlyside v. Thornton, 2 Bl. Rep. 1111.

(*t*) Herne v. Bembow, 4 Taunt. 764.

(*u*) Gibson v. Wells, 1 N. B. 290.

(*v*) Jones v. Hill, 7 Taunt. 392.

case would not lie. Sir W. D. Evans observes that if this and the former case be admitted as law, it may still be necessary to proceed in the former way. He adds, that the case of Harrow-School v. Alderton, 2 B. and P. 86. is probably the only instance of an action of waste in the memory of lawyers now living. (x)

The law gives to the lessor the liberty to enter and see if there be waste; and if he be prevented or disturbed in such entrance and view, he may bring the action without shewing in particular in what place the waste was done. (y) In general, however, he must state the nature of the waste; and if he charges voluntary waste, he cannot give in evidence permissive waste. (z)

It does not appear to be necessary to set out the title of the plaintiff or defendant: but this is only as between landlord and tenant; either where the action is brought by the immediate lessor, or by his heir or assignee against the tenant, whether lessee or assignee. Neither is it necessary to prove the whole waste stated, nor for the jury to find the particular circumstances of the waste. The jury also may assess the damages generally, without finding a verdict for the defendant for so much as the plaintiff does not prove. (a)

It seems that an action on the case will lie by the lessee for years against his undertenant for so negligently keeping his fire that the premises were burned, (b) though not against tenant at will. (c)

If the lessee for years cuts trees and lets them lie, and afterwards carries them, so that the cutting and carrying away are distinct acts, trespass *vi et armis* will lie against him, as well as waste, as a distinct property has vested in the lessor with respect to the trees as chattels. (d)

In most of these cases of waste there is likewise a preventive remedy in equity by injunction, which jurisdiction appears to be of high antiquity. (e) All persons who may be consequentially

(x) See 1 Evans's Stats. 208.

(c) 8. C. 12 Mod. 15.

(y) Hunt v. Downman, Cro. Jac. 478.

(d) Udall v. Udall, All. 81.

(z) Harris v. Mantle, 3 T. R. 307.

(e) Moor. 554. Eq. Abr. 400. Lord

(e) 2 Saund. 252. c. n. by Serjt. Wms.

Bathurst v. Burdon. See also Bract. fo. 316.

(b) Cudlip v Randall, 4 Mod. 9.

injured by the waste done may have this remedy in equity. The court will, therefore, grant an injunction at the suit of the ground landlord against the underlessee. (*f*) And a termor may have such an injunction against his lessee. (*g*)

So if one tenant in common holds as occupying tenant to the other, the effect of that contract being to withhold from the other entry for the purpose of occupation, the tenant in possession may be restrained by injunction from committing waste. (*h*) In this last case there was no remedy at law. So where there is no person in existence to whom a vested estate of inheritance is limited, a court of equity will interpose for the benefit of the contingent remainder man, either at the prayer of the tenants of the particular estates which are vested, or of the trustees to preserve contingent remainders. (*i*) So although executory devises and springing uses did not exist before the reign of Henry the Eighth, and consequently none of the rules of law respecting waste can be applied to them, a tenant in fee or his undertenant may be restrained in equity from committing waste, if the estate of the lessor is liable to be defeated by any subsequent contingency within the period limited for the taking effect of executory devises after a devise in fee. (*k*)

Where however there are no trustees to preserve contingent remainders, there is nothing either at law or in equity to prevent the tenant of the particular estate, and the owner of the absolute estate in fee, from combining to commit destructive waste, although there are intermediate contingent remainders; because in the mean time they have full power over the estate. (*l*) But the trustee of a term for a charity purchasing the reversion, although he may cut timber, cannot do so without making satisfaction to the charity. (*m*)

The court will not stay waste, where the defendant may be immediately turned out of possession; (*n*) nor where, (*o*) as in

(*f*) *Farrant v. Lovel*, 3 Atk. 723.

Atk. 117: *Poulett v. The Duchess of Bolton*, 3 Ves. J. 374.

(*g*) *Farrant v. Lee*, Amb. 105. Moor. 71. pl. 194.

(*m*) *Bays v. Bird*, 2 P. Wms. 397.

(*h*) *Twort v. Twort*, 16 Ves. 128.

(*n*) *Mortimer v. Cottrell*, 2 Cox. Ch. Ca. 205.

(*i*) *Williams v. The Duke of Bolton*, 3 P. Wms. 268. note 1. Ed. Cox.

(*o*) *Calvert v. Gason*, 2 Scho. and Lefr. 561

(*k*) *Robinson v. Litton*, 3 Atk. 209.

(*l*) *Garth v. Cotton*, 1 Vez. 546. 2

Ireland, the tenant under a covenant for perpetual renewal may be considered as having a perpetuity; for the whole inheritance being bound by the contract for renewal, the lessor without a special reservation has no right beyond the condition of the tenure; the lessor must therefore seek his remedy at law.

The application formerly depended on privity of title acknowledged by the answer; and if the plaintiff happened to state an adverse title in the defendant, or the defendant by his answer denied the plaintiff's title, injunctions were always refused, or having been granted were dissolved: but now an injunction may be obtained before answer on bill filed with an affidavit, that waste is intended to be done, on the ground of irreparable mischief. (p) But in such affidavit a particular title must be set out, and not merely a general title in fee simple. (q) The court, however, will not stay waste in digging mines until answer or default in making it. (r)

In *Barry v. Barry* (s) the court refused an injunction to stay waste on the ground that the acts of waste were of very small extent, and most of them committed some years before the commencement of the suit. The most considerable were the cutting down a few elms of trifling value, and taking down part of a garden wall, which the defendant represented himself to have done with a view to improvement. Such an excuse as this last, however, is clearly inadmissible; and the Lord Chancellor expressed himself to that effect. "I admit also," observed his lordship, "that a small degree of waste, (I do not say the smallest) manifesting an intent to do more, will be sufficient for the court to act upon: but it will look at it in the manner in which the subject is viewed by the courts of law, and there the extent of the waste done is considered very material. There is an authority at law, where a verdict having been found for the plaintiff, judgment was entered up for the defendant on account of the extreme smallness of the damages. (t) A court of equity will in this case follow the law." In the case before him, the Lord Chancellor said, the ground he went on was that that (being a case) between father and son, many things might probably be permitted, that would not have been

(p) *Piers v. Piers*, 1 Vez. 521.

3 Atk. 496.

(q) 2 Bro. Ch. Ca. 65. Anon. 1 Vez. 476.

(s) 1 Jac. and Walk. 651.

(t) *Harrow School v. Alderton*, 2

(r) *Sir James Lowther v. Stamper*, B. and P. 86.

permitted to a stranger: if this had been a stranger filing a bill, and thus delaying his motion, he should have said it was the business of the reversioner to come here promptly.

In a late case (*u*) the Lord Chancellor committed a defendant for breach of an injunction, after notice of its having been obtained; although the order for the injunction had not been served. The Lord Chancellor said, it had been held by Lord Hardwicke over and over again, that if the party is in court, that is notice enough. So if he be outside of the court, and he is informed by some one inside that it is granted, it has been held notice enough. In many cases he said you might as well have no injunction at all if notice was insufficient; and in the case of injunction, during the long vacation, the course was to serve the party with notice only, the injunction not being engrossed or sealed, or brought to be sealed. There ought however to be no delay in endeavouring to get the order drawn up, and the injunction sealed and served.

When waste sworn to is denied, proof of it by affidavit will be admitted; (*x*) and, in order to obtain an injunction to stay waste in cutting turf, the affidavit must state that the turf cut is for the purpose of sale, if the tenant be entitled to firebote. (*y*)

In *Pratt v. Brett* (*z*) the court granted an injunction to stay waste, and also the sowing the land with mustard seed, or any other pernicious crop.

It is not sufficient, to induce the court to dissolve an injunction, that the defendant admits in his answer that he has committed waste before the filing of the bill, but not since. (*a*)

A bill in equity does not lie for an account of waste, without an injunction to stay waste, if there is a proper remedy at law by action of trover: but, to prevent a multiplicity of suits, the bill for an injunction usually prays for an account of the waste done. The court however is said to make a distinction between the digging of mines, and the cutting of timber: the digging of mines is a sort of trade, and therefore there are many cases in which the court will decree an account of one to be taken, when, in the case of any other

(*u*) *Vansendan v. Rose*, 2 Jac. and Walk. 265. *Kimpton v. Eve*, 2 Ves. and R. 349.

(*x*) *Norway v. Rowe*, 19 Ves. 154.

(*y*) *De Salis v. Crossen*, 1 Ball. and Beatt. 188. *Mitchell v. Dors*, 6 Ves. 147.

(*z*) 2 Madd. 62.

(*a*) *Anon.* 3 Atk. 485.

tort, it will refuse relief. (b) So it should seem that a remedy in equity would be given in the following case. Where (c) a tenant for life levied a fine, and thereby acquired a base fee, and then committed waste, before avoidance of the fine by the reversioner, the reversioner cannot maintain trover for the timber cut, because after the tenant for life acquired the base fee the timber became part of his new estate: if, therefore, the plaintiff have no remedy in equity, he has remedy no where.

Equity will restrain tenants for life without impeachment of waste, from cutting down ornamental timber, or doing any thing which in equity may be considered as destructive of the estate. (d)

Although it is clear that waste being a tort dies with the person, yet it does not appear to be quite so clear that trover will not lie against an executor for waste done by his testator: at all events a remedy may be had in equity against the executor, if there be none at law. (e) The distinctions however, even at law, seem to support the notion that trover may be well brought in such cases at law. (f) When the cause of action is money due, or a contract gain or acquisition of the testator by the work and labour, or property of another, or a promise of the testator either express or implied; where these are the causes of action, the action survives against the executor. So although torts die with the persons committing them, yet if thereby property has been acquired, an action for the value of the property will survive, although the *tort* or *delictum* is gone. And in this equity follows law; and will decree an account of equitable waste against the executors, although there can be no injunction.

At law a writ of estrepement may be had to prevent a repetition of waste: but the remedy in equity by perpetual injunction is now found more convenient. (g)

(b) *Jesus College v. Bloom*, Ambl. 55. *Whitfield v. Bewick*, 3 P. Wms. 267. *The Bp. of Winchester v. Knight*, 1 P. Wms. 406.

(c) *Hughes v. Thomas*, 13 East. 474.

(d) *Lord Lansdown v. Lady Lans-*

down, 1 Madd. Ch. Ca. 126.

(e) *Garth v. Cotton*, 1 Dick. 213.

(f) *Hambly v. Trott*, Cowp. 376.

(g) 15 Ves. 139. *Worsley v. Stuart*, 4 Bro. P. C. 377. Toiml.

CHAPTER VI.

ON THE TERMINATION OF THE LEASE.

I. SINCE conditions of re-entry tend to the defeasance of the estate granted before its natural termination in law, they are not favoured: (a) to take advantage of the usual conditions of re-entry for rent arrear, it has been generally understood that it is necessary to observe the following rules:

1. There must be a demand of the rent; although, by special consent of the parties, a re-entry may be without any demand. (b) The king indeed may take advantage of such a condition without a demand: but the grantee of the reversion cannot. (c) Neither does the king's prerogative extend to the duchy of Lancaster: for there the king himself by his attorney must make a demand like other persons. (d)

The demand need not be made in person; and it seems that the command to receive the rent may be by parol, in the case of natural persons. (e) But corporate bodies cannot depute such an authority without writing; and such an authority ought to specify the particular lands in question, and must be special as to the person of the tenant. (f)

2. The demand must be of the precise rent due: (g) it has

(a) *Smith v. Spooner*, 3 Taunt. 246.

(e) *Zouch's case*, Cro. Eliz. 22. See

(b) Bro. Abr. Demaund. 19. Bro. Cond. 216. Bro. Entry. Cong. 2. 14. 39. Hetl. 59.

Moor. 141. Roc d. *West v. Davis*, 7 East. 363.

(f) *Knap v. Piers*, 1 Brownl. 138.

(c) Dy. 87. b. *Borough's case*, 4 Rep. 72. b.

(g) *Fabian and Windsor's case*, 1 Leon. 305. *Scot v. Scot*, Cro. Eliz.

(d) *Bonny's case*, Moor. 149.

73. *Wood v. Germons*, Cro. Jac. 390.

been said (*h*) therefore that if a lease for years be made tendering 7*l.* rent, and at the rent-day there is 3*l.* beside the rent then accrued due, a demand of 10*l.* is not good, to take advantage of the condition, because he takes it as an entire sum; but he should demand 7*l.*; and then, if he demand the arrears afterwards, it does not vitiate it. It has been held, however, sufficient to say, "I demand my half-year's rent," without naming the sum. (*i*)

3. The demand must be made on the land, unless the rent be reserved specially at some place off the land, in which case the demand must be made at the place appointed for payment. If there be a house on the land, it must be made there; and where there is no house, it must be at the most public and notorious place on the land. So if there be a house, the demand must be at the front entrance, as being the most notorious part of the house. (*k*)

So where (*l*) the Bishop of Exeter reserved rent payable at the palace at Exeter, with condition of re-entry, it was held that the rent must be demanded and tendered at the great gate of the palace at Exeter; and, although it was closed, the tenant was not obliged to go in. Where, (*m*) however, there was a lease of a house with the exception of certain chambers, reserving rent with condition of re-entry, and after the lessor re-entered; in an action brought against him by the lessee, it was held that in his justification he need not aver what part of the house he demanded the rent in: but if he say the house aforesaid, it shall be intended to be the demised premises.

4. It must be made on the precise day when the rent is made due and payable by the lessee. (*n*) But if the reservation be of a rent payable on a certain day, with a condition that if it be behind by the space of any given number of days the lessor may re-enter, the lessee is entitled to all the subsequent number of days, although a tender on the first or last day, or on any intermediate day to the lessor himself, either upon or out of the land,

(*h*) Anon. Al. 94.

(*i*) Humlock's case, Hetl. 109.

(*k*) Co. Litt. 201. b. Lord Cromwell v. Andrews, Cro. Eliz. 15. Busking v. Edmunds, Cro. Eliz. 415. Knap v. Piers, Brownl. 138. The Dean and Chapter of Gloucester's case,

Dy. 329. a. Eliot v. Nutcombe, 1 And. 27.

(*l*) Eliot v. Nutcombe, 1 And. 27.

(*m*) Dorrell v. Trussell, 2 Roll. Rep. 42.

(*n*) Scott v. Scott, Cro. Eliz. 73.

is good, and the lessor can make his demand on the last day only. (o) If the reservation be of rent at Michaelmas, or one month after, the month is considered a lunar month of twenty-eight days. (p) Where (q) the tender was made by the servant of the lessee to the daughter-in-law of the lessor, it was held that there was sufficient privity to save the condition; for as to this the daughter-in-law of the lessor was his servant, if the lessor had notice of it. If the rent be payable at S. or D., and the lessee tender it at S., the lessor cannot enter, although he demand it at D. (r)

5. The rent must be demanded a convenient time before sunset, although the rent be not due as rent till the last moment at midnight. The lessor, therefore, must come upon the land half an hour or a quarter of an hour before sunset, and continue on the land till after sunset, because the tenant has all that time to pay the rent after the demand; and, since the rent must be paid upon the land, the lessor must be there to receive it. (s) The presence of the lessor is a continuance of the demand. So if after making his demand he depart, and return a little before sunset, that will also be a continuance of the demand: but where (t) the lessor, after making his demand, left a servant on the premises to give him notice if the lessee or any on his behalf came to pay the rent, and he himself departed and did not return till after sunset, it was held that the demand was not continued by the presence of the servant, because the servant was not empowered to make any demand.

If the condition be for re-entry for rent arrears for ten days, no sufficient distress being on the premises, it seems there should be a sufficient distress for a reasonable time, so that the lessor may have notice of it: (u) but it is not necessary that there should be a sufficient distress at the time of the demand, if there was sufficient for a reasonable time before. (x)

(o) Bro. Cond. 60. *Hill v. Grange*, Plow. 172. *Clun's case*, 10 Rep. 139.
 a. *Cropp v. Hambleton*, Cro. Eliz. 48. *Wood v. Chivers*, 4 Leon. 180. *Kirby v. Green*, 2 Entw. 1137. *Allen v. Harrison*, 1 And. 9.

(p) *Wood v. Chivers*, 4 Leon. 179.

(q) *Cropp v. Hambleton*, *supra*. *Cropp's case*, Godb. 38.

(r) Dy. 329. in marg.

(s) Bro. Entr. Cong. 81, 90. *Potter v. Foster*, 3 Bulstr. 296. *Maunde's case*, 7 Rep. 28. 5. *Knap v. Piers*, 1 Brownl. 138.

(t) *Wood v. Chivers*, 4 Leon. 179.

(u) Godb. 67.

(x) *Worcester v. Stone*, Cro. Eliz.

Lastly, a demand must be made in fact, and so averred in pleading, though no one should be on the land ready to pay it. (y)

If, after all these requisites have been performed, the tenant refuses to pay the rent, the reversioner is entitled to take advantage of the condition of re-entry at common law, and originally must have made an actual entry to avoid the lease: (x) but the law on this point has undergone considerable modifications; and it is now settled that the rule in actions of ejectment for confessing lease entry and ouster will include such an entry as was formerly necessary to avoid a lease by reason of condition of re-entry. (a)

Now by the stat. 4 Geo. II. c. 28. s. 2. (b) lessors having a right to re-enter for non-payment of rent, may as often as one half year's rent (more than one half year's rent, (c)) is in arrear, without any formal demand or re-entry, serve on the tenant a declaration summons, (c) in ejectment; or in case the same cannot be legally served, or no tenant be in actual possession, affix the same to the door of the messuage; or in case the premises shall not be a messuage, then on some notorious part of the premises demised, (d) for the recovery of the demised premises; and recover judgment, and sue out execution in the same manner as if the rent in arrear had been lawfully demanded, and re-entry made. Before this statute both courts of law and equity exercised a discretionary power of restraining the lessor from proceeding in case of non-payment of rent by compelling him to take the rent really due to him, if the lessee should be willing to pay it; (f) which was the principle also in the old process of *cessavit*, from which the tenant, by tendering the arrears or giving security, might free himself (g)

68. *Grygg v. Moyses*, Cro. Eliz. 764.

(y) 1 Roll. Abr. 458.

(z) Anon. 1 Ventr. 332.

(a) *Withers v. Gibson*, 3 Keb. 218.

Abbot v. Sorrel, 3 Keb. 382. Anon.

1 Ventr. 248. *Little v. Heaton*, 2 Ld.

Raym. 760. *Clerk v. Pywell*, 1 Saund.

319. *Oates d. Wigfall v. Brydone*, 3

Barr. 1896. *Goodright d. Hare v.*

Cator, Dougl. 477.

(b) Irish stat. 11 Ann. c. 2.

(c) St. 11 Ann. Ir.

(d) This clause not in the Irish st.

11 Ann. but has been since supplied

by stat. 15 and 16 Geo. III. c. 27. s. 4.

and it is provided by s. 5. that such

service and notice shall be allowed to

be sufficient only where it has been

affixed one month before the bringing

the ejectment.

(f) Bull. N. P. 92. *Archer d.*

Hankey v. Snapp, Andr. 341.

(g) Pig. Com. Rec. 62. *Goodright d.*

Stephenson v. Norright, 2 Bl. Rep.

But the stat. 4 Geo. II. c. 28. s. 4. declares that if the lessee at any time before or after trial in ejectment pay or tender to the lessor the whole rent in arrear with the costs, (or pays such arrears and costs into the court where the cause is depending,) (h) the lessee shall be relieved, and hold the lands according to the lease. If, however, the lessee permits execution to be sued on such a judgment, without paying the rent arrear and full costs, and without filing a bill for relief in equity, within six calendar months after such execution executed, he shall be barred and foreclosed from all relief both at law and in equity, except by writ of error for the reversal of such judgment.

Under this statute there is no difference between a lessee and his mortgagee, as to the relief to be obtained under it: and, therefore, if a recovery has been obtained against the lessee, his mortgagee is entitled to the same relief, and on the same terms. (i) If the rent is tendered before notice of action, any subsequent proceedings will be set aside for irregularity. (k)

Where the lessors of the plaintiff were both devisees and executors, and rent was due to them in both capacities, proceedings were stayed on payment of rent due to them as devisees, with costs against them, because as executors they were not entitled to bring ejectment. (l)

The Irish stat. 11 Ann. c. 2. contained a saving clause in favour of infants, feme covert, persons *non compos mentis*, and out of the kingdom: but this clause has been repealed by the stat. 56 Geo. III. c. 88. s. 14. By the Irish stat. 5 Geo. II. c. 4. no injunction to stop proceedings at law for rents shall issue for want of an answer without affidavit verifying the bill.

It is necessary, however, for the lessor under the statute to prove at the trial that no sufficient distress was upon the premises, countervailing the arrears due: in cases, therefore, where the lessor cannot produce evidence to substantiate this point, he must proceed at the common law as before. (m) Since, however, in such cases before the statute, it appears to have been the practice

746. *Holdfast v. Morris*, 2 Wils.
115.

(h) Not in the Irish stat. 11 Ann.

(i) *Doe d. Tubb v. Roe*, 4 Taunt. 887.

Doe d. Whitfield v. Roe, 3 Taunt. 402.

See the Irish stat. 11 Ann. c. 2. s. 3.

(k) *Goodright d. Stephenson v. Noright*, 2 Bl. 747.

(l) *Duckworth d. Tubley v. Tunstal*,
2 Barn. 150. 8vo. 2 Selw. Nisi. Pr. 211.

(m) *Doe d. Foster v. Wandlam*, 3 T.
R. 117. See 1 Burr. 619.

of courts of equity to restrain proceedings at law, where there was a sufficient distress for rent, it may be fairly said that the stat. 4 Geo. II. has in effect shut the door against any proceeding by re-entry at the common law. (n)

In *Doe d. Hitchings v. Lewis*, (o) the lessor having recovered in a former ejectment under the act, the lessee after a lapse of years brought a second ejectment, on the title of his lease; and the proceedings in the first ejectment being in all other respects confessedly regular, he insisted that he was entitled to recover, because no affidavit was produced, which had been made in conformity with the act. But the court held that it was not incumbent on the landlord to prove the regularity of all the circumstances upon which his judgment had been founded, but that the judgment must be taken to have been right as nothing appeared to the contrary.

Where (p) there was a proviso for the re-entry of the landlord, in case the rent should be in arrear for fourteen days, and no sufficient distress should be found on the premises; and the demise to the plaintiff in the ejectment was laid on the second of May; the plaintiff was held entitled to recover upon proof that half a year's rent was due on the Lady-day preceding, and that the broker went upon the premises in May, and found nothing to distrain upon; and there was likewise evidence that no distress was on the premises on the sixth of June, in the same year, the day on which the declaration was delivered. This was *prima facie* evidence, sufficient to call on the defendant to shew that there was a sufficient distress within the terms of the proviso.

It has been thought (q) that the statute does not relieve the party from making the obligation of a demand, where it is expressly provided by the lease that the rent shall be demanded: but the court thought, contrary to the opinion of Lord Ellenborough, C. J., that the case was the same whether the parties made an express proviso, that the landlord should re-enter after rent lawfully demanded, or whether they omitted it. The court refused relief after trial. (r)

If the lease be made with a condition to be void on the non-

(n) See *Doe d. Lord Jersey v. Smith*, 1 Brod. and Bing. 185. *Per* B. Wood.

(o) 1 Burr. 614.

(p) *Doe d. Smelt v. Fuchau*, 15 East. 363.

(q) *Doe d. Scholefield, v. Alexander*, 2 M. and S. 525.

(r) *Roe d. West v. Davis*, 7 East.

payment of rent, the lessor can take no advantage of the forfeiture without a demand, and with the formalities already mentioned, as in other cases of forfeiture. (s) The crown alone, by virtue of its prerogative, is exempted from demand. This, however, appears to be aided by the statute 21 Jam. I. c. 25. (t) (which extends also to the duchy of Lancaster,) if the rent in arrear is paid before office. (u) If it be a freehold lease, the office is an office of entitling, which must be executed by the commissioners appointed under the exchequer seal, in the county where the lands lie: if it be an estate for years, the office is merely an office of information which may be directed to commissioners in any county. (x)

By the third section of the stat. 4 Geo. II. c. 28. it is provided that in case the lessee or his assigns, or any other person claiming any interest in law or in equity, shall within six months after the execution of the judgment obtained by the landlord in pursuance of the act file a bill for relief in equity, they shall not have, or continue any injunction against the proceedings at law in ejectment, unless forty days next after a full and perfect answer by the lessor of the plaintiff he or they bring into court and lodge with the proper officer of the court, the sum sworn by the lessor of the plaintiff to be due over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the landlord on good security, subject to the decree of the court. And in case such a bill shall be filed within the specified time, and after execution is executed, the landlord shall be accountable only for so much as he *bona fide* shall make of the demised premises from the time of his taking actual possession; and if that happen to be less than the rent, then the tenant before he is restored to the possession shall pay to the landlord the deficiency.

The six months given to tenants to redeem under the statutes relating to ejectments either in England or Ireland are calendar months, and the day on which the writ of execution is executed is not included. (y) If rents are paid for minors (lessées) by their

(s) *Hanson v. Norcliffe*, Hob. 331. (u) *Finch v. Throgmorton*, Moor. Amhurst v. Palmer, 26. Masham v. 291. *Marko v. Johnson*, 1 Keb. 858: Goodere, 1 Freem. 242. Dy. 51. b. *Tho. Raym.* 137.

See Shep. T. 284.

(t) Stat. 15 Cha. I. c. 3. Irish.

(x) *Parlow v. Corn*, Cro. Eliz. 855.

(y) *Riddulph v. St. John*, 2 Scho.

guardians to save their estates from ejectment, it is considered in equity as paid out of the principal of their fortunes. (a)

It has been frequently matter of discussion of late years whether courts of equity will give relief against ejectments for breaches of covenants to repair, and of covenants for good husbandry: but it seems now to be settled that courts of equity have no such jurisdiction in any case, except that of the breach of a condition for the nonpayment of rent. And even the jurisdiction exercised in that particular case seems to rest more upon the legislative authority of the statute 4 Geo. II. than upon any fair or reasonable ground to be maintained in a court of equity. In the instance of a covenant to pay a sum of money the court considers the payment of the money, with the interest, from the time of the breach of the condition, as an adequate compensation for the nonpayment of the money at the time stipulated. This doctrine, although liable to some weighty objections, has been recognised and acted upon without doubt upon leases with reference to the nonpayment of rent as well as in many other cases. The practice, indeed, of the court is fixed and regulated by the statute: but the statute determines no case but rent, upon which relief is given at law as well as in equity, and excludes any further relief in equity; but the situation of a landlord with respect to other covenants, such as covenants to repair and for good husbandry, is very different. For in an action for the rent, he obtains the specific thing for which he sues; but in other covenants, although he may obtain damages for the breach of them, there is a wide difference between damages and the actual expenditure upon repairs specifically done. Even after damages recovered, the landlord cannot compel the tenant to repair, but can only bring another action: the tenant, therefore, notwithstanding these actions, might keep the premises in a ruinous state, till the expiration of the term. (b)

With respect to the case of *Sanders v. Pope*, (c) decided by Lord Erskine, it seems to have been considered as governed by its own particular circumstances, although Lord Erskine's reasoning might extend to a general covenant to repair. The tenant

and Lefr. 521. *Dowling v. Foxall*, 1 Ball. and Beat. 193.

(a) *Ex parte M'Kay*, 1 Ball. and B. 405.

(b) *Hill v. Barclay*, 16 Ves. 402.

18 Ves. 56. *Wedman v. Calcrafft*, 10 Ves. 67. *Lovat v. Lord Ranelagh*, 3 Ves. and B. 24. *Bracebridge v. Buckley*, 2 Price Exch. Rep. 200.

(c) 12 Ves. 280.

there, not having laid out the sum of 200*l.* in repairs, within the period limited by the covenant, offered afterwards to lay out that sum; and it did not appear that there had been any dealing by request and refusal, between the lessor and lessee, in the period during which the money ought to have been applied. The injunction had been continued by the master of the rolls, (*d*) which implied a declaration of his opinion that the case was to be regarded as one that might admit relief. Lord Erskine's opinion also was that as the covenant specified a liquidated sum to be laid out within a given time, and as the landlord could not be injured by the expenditure of that sum, with an increase after the time had expired with all costs, relief was in the discretion of the court. So in another case (*e*) Lord Eldon granted a temporary injunction to restrain an action for a breach of a covenant to repair, on the particular circumstances of the case. The bill stated, that the plaintiff being tenant of the premises in question under a lease from the former owner, containing a covenant for perpetual renewal, surrendered the same in February 1810, to the defendants, (The South London Water Works Company), who were the assignees of the reversion, and took a new lease from them for twenty one years with a covenant to repair, and a proviso that if not repaired within three months after reasonable notice, the lease should be void; that on the 28th May, 1813, the Vauxhall Bridge Company, by virtue of an act of parliament, enabling them to take possession of certain buildings, (of which the demised premises formed a part) for the purpose of that act, gave notice to the plaintiff to quit and deliver up the possession; upon which a treaty being set on foot respecting the terms of compensation, it was concluded on the 16th of June following, for the price demanded by the plaintiff; that in August following, a fire broke out on the premises, which had then been sub-demised by the plaintiff, subject to the covenants in the original lease; that on the 14th of the same month the defendants sent notice to the plaintiff to repair; that on the first of September, at a meeting of the Vauxhall Bridge committee, the plaintiff's solicitor presented the notice, and was informed by the chairman of that committee, (who was also chairman of the committee of the water-

(*d*) 12 Ves. 213.

Water Works Company, 2 Meriv. 65.

(*e*) *Hannon v. The South London*

works company,) that he need not trouble himself, by reason of there being a treaty on foot between the two companies. What was insisted on, therefore, in this case was, that the plaintiff should have repaired these premises pending a treaty with a third party; in the result of which, if completed, they would have been pulled down. The Lord Chancellor said, he should be strongly inclined to grant an injunction in such a case, if properly made out: but here the plaintiff had rested his equity on a ground which must fail, *viz.* what passed between him and the chairman of the committee of the Vauxhall Bridge Company, which could not bind the Waterworks Company, because the chairman was then acting as agent to the Bridge Company. His lordship ordered execution to be staid, with a view to an agreement between the parties; and, the matter being afterwards compounded, no further order was made.

Where, however, (*f*) the breach complained of was an omission to insure against fire, the Lord Chancellor refused an injunction, saying, that the omission to insure was a stronger case than the omission to repair, because in the latter case the landlord might by exercising due vigilance see to the observance of the covenant: but in the former the landlord must rely upon the tenant for the fulfilment of the obligation.

So it has been decided (*g*) that a court of equity cannot relieve against an action of ejectment for the breach of a covenant not to alien without licence; because, as the court expressed it, there was no measure of the damage. It has been since observed (*h*) that what the court there meant by not having any measure of damage was not that they could not have the casual opinion of a jury, but that there was no certain rule to go by, as the rule already mentioned with respect to rent, namely, the principal and interest. So in another case (*i*) the court refused to restrain the entering up judgment in an action for the breach of a covenant, not to exercise any trade on the premises without licence in writing.

If, however, the lessor bring an action of ejectment for the breach of several covenants, and obtain a verdict upon the first,

(*f*) *White v. Warner*, 2 Meriv. Ch. Ca. 459. *Reynolds v. Pitt*, 19 Ves. 141. *Rolfe v. Harris*, 2 Price Exch. Rep. 206. n.

(*g*) *Wafer v. Mocatto*, 9 Mod. 112.

(*h*) *White v. Warner*, 2 Meriv. Ch. Ca. 459.

(*i*) *Macher v. The Foundling Hospital*, 1 Ves. and B. 187.

which is for non-payment of rent, although the court of Chancery will not prevent him from proceeding upon other covenants against the breach of which it cannot relieve, it will restrain him from taking execution upon a verdict obtained for nonpayment of rent only. (j)

Where (k) there was an indenture of lease, with clause of re-entry for the breach of a general covenant to repair, and it was further stipulated by an independent covenant that within three months after notice the tenant should repair all the defects specified in the notice, it was held that the landlord, after serving a notice, might within the three months bring ejectment on the clause of re-entry; for by the breach of the general covenant the lease was forfeited, and the giving the notice was no waiver.

A condition to repair is, in one sense, merely collateral to the land; a notice therefore must be given to the lessee in person, and notice to an undertenant in possession is not sufficient. (l) The term "collateral" must be here taken in a different sense from that applied in other places to covenants and conditions, which are collateral to the land. In the latter sense, such conditions to repair are not collateral: but the land is not the debtor in case of a breach of this covenant as for nonpayment of rent.

Where (n) a feme sole subject to a condition of re-entry for the commission of waste married, and her husband committed waste, it was held to be no breach of the condition as against the wife surviving.

If the lessee covenant not to use, or permit to be used, any trade or business on the premises, without licence; and then without licence he assign to a schoolmaster, who carries on his occupation there: this is a breach to entitle the lessor to re-enter. (o) In such covenants a licence to exercise a particular trade cannot be construed into a general licence to exercise any trade. (p)

That the lessee shall continually dwell on the premises, under

(j) *Lovat v. Lord Ranelagh*, 3 Ves. and B. 24. *Pine v. Sturly*, Bull. N. P. 97.

(n) *Cobb v. Prior*, 2 Leon. 48. Moor. 49.

(k) *Roe d. Goatly v. Pain*, 2

(o) *Doe d. Bish v. Keeling*, 1 M. and S. 95.

Campb. N. P. C. 520.

(p) *Macher v. The Foundling Hospital*, 1 Ves. and B. 187.

(l) *Stweton v. Cushe*, Yelv. 36.

pain of forfeiture, is a good condition: (q) but where (r) there was a lease for ninety-nine years to A., remainder to B. for ninety-nine years, remainder to C. for ninety-nine years, provided the said lessee shall inhabit the premises; this was construed *reddendo singula singulis*, that each should inhabit in succession.

Where (s) a lessee for years of a manor is subject to a proviso of re-entry if he molest, vex, or put out any copyholder, paying his duties and services; this proviso only extends to expulsions or molestations of the copyhold tenants in respect of their tenements held by copy, and not to breaches by tort or disturbance in their other lands.

If a man lease his lands with a condition that the lessee shall rake his ditches without saying how often, raking them once will save the condition. (t) And if the condition be to do an act at the end of seven years, or any other period on request, the request must be made on the last day: but it may be at any time during that day, since in law there is no fraction of a day. (u)

There are several modes of alienation which have been considered no breaches of a general condition not to alienate without licence: making a will and appointing executors, or the granting of letters of administration by the ordinary to the administrator of an intestate lessee, (y) committing an act of bankruptcy, (z) or confessing a judgment by which the term may be taken in execution. (a) If there is no collusion, all these are no breaches of such a general covenant, because such alienations are consequences of law, and do not take place directly by the act of the party. Neither is there any difference between a judgment obtained in consequence of an action resisted, and a judgment signed under a warrant of attorney. (b) If the warrant itself could be a specific lien on the estate, then, perhaps, it might come within the words of the covenant. Where, (c) however, it was stated as an ad-

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| (q) Chicheley's case, Dy. 79. a. | 85. pl. 9. Philpot v. Hoare, 2 Atk. |
| (r) Ratcliffe v. Dudeney, Styl. 176. | 220. |
| (s) Penn v. Glover, Cro. Eliz. 421. | (a) See 5 Vin. Abr. 124. pl. 5. |
| (t) Bro. Cond. 6. | (b) Doe d. Mitchinson v. Carter, 8 |
| (u) Fitzhugh v. Dennington, 2 Salk. | T. R. 57. |
| 585. | (c) Doe d. Mitchinson v. Carter, 8 |
| (y) Sir W. More's case, Cro. Eliz. 26. | T. R. 300. See Dy. 6. a. in Marg. 1 |
| (z) Goring v. Warner, 7 Vin. Abr. | And. 124. 1 Leon. 3. |

ditional fact that the warrant of attorney was executed for the express purpose of getting possession of the lease without the consent of the lessor; it was determined to be a fraud upon the covenant, and to amount, consequently, to a forfeiture. But where (d) the tenant, having borrowed money, left the title deeds with the creditor who advanced the money, and having also confessed a judgment to another creditor, who sued out execution, the sheriff sold the term to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff; the depositing the deeds with the creditor, although in itself no cause of forfeiture, because it gave no legal title, took the case out of the principle of the case of *Doe v. Carter*; (e) because, in consequence of it, the subsequent proceedings could not be said strictly to be *in invitum*.

That the assignees of a bankrupt may take without forfeiture is now fully established; and a general practice has consequently been adopted of inserting in leases a special proviso, in case of such an event. (f) The taking the benefit of an insolvent act has not been considered as entitled to so much favour: it will, therefore, create a forfeiture of a lease containing such a general covenant against alienation; and it is said to have this effect because it is in the nature of a voluntary alienation. (g)

Where the interest of the lessee is merely equitable, as, for instance, under an agreement for a lease with such a covenant, it does not appear to be clear whether equity will follow the law. Where, (h) therefore, there was an agreement for a lease to contain a covenant not to alien, it was doubted whether, in case of bankruptcy, such articles could be enforced against the lessor in favour of general creditors: but at all events they cannot be so enforced in favour of a particular assignee.

If a feme sole lessee with such a condition take baron, this is no breach: (i) but it has been said that upon her death the condition would operate, and that the baron surviving would not be entitled to the lease. (k) Where, (l) however, a lease was made

(d) *Doe d. Duke of Norfolk v. Hawke*, 2 East. 481. *Russell v. Russell*, 1 Bro. Ch. Ca. 269.

(e) 8 T. R. 57. See last page.

(f) *Roe d. Hunter v. Gallier*, 2 T. R. 133.

(g) *Shee v. Hale*, 13 Ves. 404.

(h) *Weatherall v. Geering*, 12 Ves. 512.

(i) *Moor*. 11.

(k) *Moor v. Farren*, 1 Leon. 3.

(l) *Anon. Moor*. 21.

to a baron and feme for years, with a proviso that if the lease should come into the possession of any other but the baron and feme and their issue, then on the tender of 100*l.* it should be lawful for the lessor to re-enter; and after the death of the baron the feme surviving took a second baron: this was held to be a breach, because the lease seemed to be made for the benefit of the issue of the prior marriage.

Whether a bequest of a term by will to a specific legatee is a breach of a condition not to alien seems to be a question. (*m*) In one case (*n*) it was said that the devise of a term would not be a breach of such a covenant, because a devise is not a lease: this, however, does not seem to be a very sufficient reason, and the doctrine seems to be contradicted by other cases. In the case of *Parry v. Herbert* (*o*) a lease is stated to have been made for years, upon condition that if the lessee during his life assigned his term to any other, without the assent of the lessor, it should be lawful for the lessor to re-enter. The lessee devised the term by his will to another: and the question was, whether this was a cause of forfeiture, because during his life the assignment did not take effect; and yet *R. Brooke* and the master of the rolls thought it was a forfeiture, because the devisee, when he is in, shall be said to be in by the assignment of the devisor during his life. And they took a distinction between an assignment in law, and an assignment which the lessee himself makes; for it was clear that the executor would have taken without a forfeiture. The reporter adds a *quære* to this case; because nothing more was said about it at that time. But the same case is reported as adjudged in 4 *Leon.* 5. It is there stated thus:—*Lessee* for years, upon condition that he should not grant over by will or otherwise; and he devised the same to his executors, who accepted it only as executors, and not as devisees: it was holden that the condition was broken, because he had done as much as in him lay to grant it over. Both these books are, indeed, rather wide of the point, because the words “during his life” in the report of the case by *Dyer* seem to have created the only difficulty; and, as stated in *Leonard*, the condition expressly restrained aliena-

(*m*) *Crusoe d. Blencow v. Bugby*, 3 *Wils.* 237. *Doe d. Goodbehere v. Bevan*, 3 *M. & S.* 361.

(*n*) *Fox v. Swann*, *Styl.* 483.

(*o*) *Dy.* 43. b.

tion by will; and the case in effect turned upon a collateral question, whether it was in the power of the executors by electing to take as executors to take the case out of the condition. Either way, however, the tendency of the court seems to have been to admit the doctrine that a specific devisee is just as much an assignee within the meaning of the condition, as one by deed in the lessee's lifetime. The next case which occurs is that of *Knight v. Mory* (p) where in replevin it is reported to have been resolved that a devise was breach of such condition. The lessee however devised his term with the assent of the lessor; and, consequently, the point was not directly in issue: but the case, independent of the resolution of the court, shews that there was a prevailing opinion that the assent of the lessor was necessary to a devise of the term, where there was a general condition not to alien. So in *Barry v. Staunton*, (q) on a special verdict, three judges held clearly that a devise was as strong as any other alienation. Popham, J. delivered no opinion. Another case (r) which occurred in the 20th Eliz. seems to agree with the others in principle, although it seems to have been mis-cited with respect to the point said to have been decided. A term was granted on condition that the lessee should not alien without licence. The lessee devised it by his will, and made the legatee his executor; and then the legatee entered generally: and it was adjudged a forfeiture and breach of the condition; because, said the party citing it, the general entry shall be as devisee. Now it is observable that this case was cited with a view to shew that if an executor be likewise a devisee, his general entry shall be considered as devisee, and not as executor: a point which we have already shewn has been long settled otherwise. But from the great similarity which exists between this case and the case before mentioned, under the name of *Parry v. Herbert*, it seems to be evident that the point which actually was decided went no farther than the judgment in that case, viz. that since the testator had done all in his power to alienate, no option remained in the executor to take it as executor or legatee, because the lease was forfeited by the attempt to devise it. In this point of view it stands alone; and the question whether a general entry by the

(p) Cro. Eliz. 60.

104. Gouldsb. 184.

(q) Cro. Eliz. 330. See also *Barry v. Taunton*, Cro. Eliz. 331. Poph.(r) *Lord Borroughs v. Lord Windsor*, cited Moor. 351.

executor shall be in his character of executor or devisee did not arise.

There is no case which decides whether treason, felony, or outlawry, in a civil suit, will occasion a breach of a condition not to alien: but, since they are in some measure involuntary, they may possibly be exceptions to the general rule. (*s*)

A covenant not to assign will not restrain underletting; (*t*) neither will a covenant not to underlet prevent the lessee taking in lodgers. (*u*) But a covenant not to "let or assign" will include underleases; (*x*) and a covenant against underleases will restrain assignment. (*y*)

Where (*a*) there was a general proviso for re-entry for alienation without licence, and the lessee agreed with another person to enter into partnership with him, and that he should have the use of a back chamber and some other parts of the house exclusively to himself, and the rest jointly with the lessee, and accordingly let him into possession, it was held that this would entitle the lessor to re-enter.

An advertisement is no breach of a condition not to alien. (*b*) So if the lessee merely deposit the indenture with a specific creditor, there is no breach, because it gives no legal title. (*c*) If there is a condition not to alien to A., an alienation to B., who aliens to A. if there is no collusion, will not induce forfeiture. (*d*)

If the covenant be that the lessee shall not assign, assignment by his executor is no breach; because the condition is confined to the joint lives of lessor and lessee, and is extinguished by the death of one of them: (*e*) but where there was a proviso against alienation, except by will, executors were said not to be within the exception: although the point was not directly decided. (*f*)

Where an estate is granted to one and his executors, admini-

(*s*) Sir W. Jon. 20. 80. *The King v. Robinson*, Wight. Rep. 388.

(*t*) *Crusoe v. Bugby*, 3 Wils. 237.

(*u*) *Doe d. Holland v. Worsley*, 1 Camp. N. P. C. 20. *Doe d. Pitt v. Laming*, 4 Campb. N. P. C. 77.

(*x*) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(*y*) *Greenaway v. Adams*, 12 Ves. 395.

(*a*) *Roe d. Dingley v. Saks*, 1 M. & S. 997.

(*b*) *Gourlay v. The Duke of Somerset*, 1 Ves. and B. 68.

(*c*) *Doe d. Goodbehore v. Bevan*, 3 M. and S. 353. See *Hawkins v. Ramsbottom*, 1 Price Exch. Rep. 138.

(*d*) Dy. 45. a.

(*e*) *Anon. Dy. 65. b. Moor. 11.*

(*f*) See *Crisp v. Lloyd*, 5 Taunt. 249.

strators, and assigns, with a condition of re-entry on alienation by the lessee, his executors, administrators, or assigns, the word "assigns" in the condition will not restrain either the immediate assigns by act of the party from alienating, or assigns with licence; and, consequently, it will not restrain any subsequent alienations from one assign to another. For in *Dumpor's case*, (g) it was settled that if the lessor give the lessee a licence to alien, the licence will determine the condition. So it has been frequently determined that if there is a proviso that the lessee shall not assign except to a particular person, and alienation is made to that person, there is no further restraint on alienation. (h)

It has never yet been determined whether a judgment creditor, who takes a term in execution, is restrained by the word "assigns:" but the presumption is that he is free from restriction, because he takes the term against the will of the lessee (i) But it seems clearly to follow that if the assignees of a bankrupt can take without forfeiture, they may assign without licence, because the first assignment by the commissioners is not a complete and perfect assignment within the meaning of the statutes; and passes only an interest, subject to a trust, to sell and dispose of it for the benefit of creditors; and, consequently, the disposition is not complete till sold by the assignee for their benefit. The immediate vendee likewise from the assignee is exempt, and so are all subsequent assignees *ad infinitum*. (k)

Where (l) A. leased to B. with a covenant, that B., his executors or administrators, should not assign without licence; and afterwards B. became bankrupt, and afterwards by mesne assignments the lease came again into his possession, it was held that in his character of assignee he was not restrained by this covenant. It is true that the word "assigns" was not in the restrictive clause: but it is conceived that no distinction arises from that circumstance. •

Where (m) the actual occupation of the premises is annexed as

(g) *Dumpor's case*, 4 Rep. 120.
Brummell v. Macpherson, 14 Ves. 173.
Simpson v. Tittrell, Cro. Eliz. 242.
 Dy. 8. b. 7. a. Dy. 152. pl. 7. *Hussey v. Starre*, 3 Keb. 604. *Thornhill v. King*, Cro. Eliz. 757.

(h) *Fox v. Whichcot*, Cro. Jac. 398.

(i) *Doe d. Mitchinson v. Carter*, 8 T. R. 57.

(k) *Doe d. Goodbehere v. Bevan*, 3 M. and S. 353.

(l) *Doe d. Cheere v. Smith*, 5 Taunt. 795.

(m) *Doe d. Lockwood v. Clark*, 8

a conditional limitation of the lease, the bankruptcy of the tenant makes the lease void without entry; therefore, where a lease was made for years, if the lessee should so long inhabit the premises, and actually occupy them, and not let or assign them, this was not a case of forfeiture: and, therefore, the assignees of the tenant who became bankrupt were held to take no interest in the lease.

It seems to be doubtful how far executors or administrators would be restrained by a covenant by the lessee, for himself and his assigns: (*n*) and it has been argued that because executors and administrators undertake the office voluntarily, they would be bound by the word "assigns," although not expressly named. (*o*)

Where (*p*) there was a right of entry for underletting, Lord Alvanley, sitting at *nisi prius*, thought that if a stranger is found on the premises with the appearance of tenant, it was *prima facie* evidence of underletting, and sufficient to call on the defendant to explain the circumstance. But a demurrer will lie to a bill in equity to discover an assignment or underlease without licence, if it do not waive the forfeiture. (*q*)

Where the lessor enters into part of the land during the lease, and afterwards the lessee assigns over the remainder without licence, the covenant not to alien is broken, although the lessor had a tortious possession of part of the land; because the covenant is collateral to the land; (*r*) but, if the lessor accept a lease of part of the land, the condition is suspended, because it cannot be apportioned. (*s*) On the same principle, if the lessee alien a part only, the lessor will recover the whole. (*t*) So if a lease be made to two jointly, and they make partition, and then one aliens, this is the forfeiture of both. (*u*) On the same principle, if a lease be made to three, a licence to one will determine the condition

East. 185. Doe d. Duke of Norfolk
v. Hawke, 2 East. 481.

(*n*) Cro. Eliz. 757. Moor. 11. Small-
piece v. Evans, 1 And. 124. See More's
case, Cro. Eliz. 36.

(*o*) Doe d. Goodbehere v. Bevan, 3
M. & S. 353. Roe d. Gregson v. Har-
rison, 2 T. R. 425.

(*p*) Doe d. Hendley v. Rickaby, 5

Esp. N. P. C. 4.

(*q*) Lord Uxbridge v. Staveland, 1
Vez. 56.

(*r*) Collins v. Sillye, Styl. 265.

(*s*) Brightman v. Sanford, Owen
41. Rawlins's case, S. C. 4 Rep. 52.

(*t*) Year-book, 38 Edw. III. 34.

(*u*) Gostwicke's case, Cro. Eliz.

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as to all. (x) So a licence to alien a part will determine the condition as to the residue. (y)

A condition may be destroyed or suspended by the act of the lessor, but not by the act of the lessee or a stranger. Therefore, the assignment of the term in part of the premises will not destroy the condition : (x) but where (a) the lessor, with the consent of the lessee, built a new barn on the farm, and the lessee took a new lease of the barn, the condition was suspended, because the old lease was in effect surrendered as to that part.

If the rent and reversion are extended, and the lessee pays rent to the conusee, there is no breach of a condition for non-payment of rent : (b) but the condition is suspended, though a moiety only be extended by an elegit. (c)

If the lessee is ousted, and the disseisin continues till after the rent-day, the lessor after demand of the rent may either enter for condition broken, if there be such a condition of re-entry in the lease, or distrain ; for the land is subject to those lawful remedies which the lessor or the law has provided, to recover the rent or the possession into whatever hands the land comes ; and the act of a stranger cannot deprive him of the advantage of a condition annexed to the estate of the lessee, when he parted with the possession. (d)

Where (e) there was a lease of several manors, with several reservations by the same indenture, with a condition of re-entry, if the said rents, or any of them, or any part thereof, should be in arrear ; this condition was held to be entire, notwithstanding the several reservations.

So also, if the condition be that if the rent or a sum in gross stipulated for in the lease to be paid by instalments, should be in arrear, &c. and afterwards the rent is suspended, the condition will be suspended also, as to the payment of the instalments of the sum in gross. (f)

(x) *Leeds v. Crompton*, stated in 4 Rep. 120 a.

(y) *Dy.* 324.

(z) *Hawkesworth v. Davies*, Godb. 338.

(a) *Culdee v. Sharp*, Noy. 126.

(b) *The Bishop of Bristol's case*, 3 Leon. 113.

(c) *Moor.* 22, 71, 91. 4 Leon. 391.

(d) *Humphrey v. Danson*, Cro. Jac. 300.

(e) *Ap Howell v. Monnoux*, *Moor.* 97. *Winter's case*, *Dy.* 308. b. *Hill's case*, 4 Leon. 187.

(f) *Rawlins's case*, 4 Rep. 52.

If during a lease in possession the lessor lease to a second person, to commence after the expiration of the former lease with condition of re-entry for non-payment of rent, and the first lessee surrenders, the lessor cannot take advantage of the condition of re-entry in the second lease, without giving notice of the surrender of the first to the second lessor. (*g*)

If the indenture of lease be in the possession of a third person, and the lessee dies, the executor is not liable to forfeiture, for the breach of a condition contained in the lease, unless he has notice of it. But it is conceived that he ought to use due diligence to ascertain the conditions and other terms of the lease. (*h*)

Although a condition of re-entry cannot be apportioned by the act of the party, it may be so by act of law. (*i*) Therefore, where (*k*) the lessor being tenant in fee of Whiteacre, and tenant for years of Blackacre, leased both in one lease, with a condition of re-entry, and died, the condition was apportioned.

If one coparcener enter for a condition broken, the entry will vest the possession in both. (*l*) So an entry by one tenant in common will serve for all. (*m*)

A corporation aggregate cannot themselves enter for a condition broken; neither can they command their bailiff to enter without deed. (*n*)

If the condition in a lease for years be that for non-payment of rent or the like the lease shall be void, after the lessor has made a legal demand, and the lessee has refused to pay, the lease is absolutely determined, and cannot be set up again by the acceptance of rent or any other act. (*o*) But if the lease be voidable only on non-payment of rent, acceptance of rent accrued due after breach of the condition is a waiver of the forfeiture. (*p*) So if the lessor distrain, though it be for the same rent, the lease is affirmed, because at the common law no distress can be made after the lease is determined: but the mere acceptance of the rent

(*g*) Gurney's case, cited Poph. 165.

(*h*) Northcote v. Duke, Ambl. 512.
2 Edm. 319.

(*i*) Moor. 27.

(*j*) Moody v. Garmon, 3 Bulstr. 153.

(*k*) Doe d. Gill v. Pearson, 6 East.
181. Bro. Entr. Cong. 37. 1 Roll.
Abr. 740. F. pl. 3. 7.

(*m*) Hob. 120.

(*n*) Erneby v. Wallround, Dy. 102 b.
1 Roll, Abr. 514.

(*o*) Browning and Boston's case,
Plow. 133.

(*p*) Goodright d. Walter v. Davids,
Cowp. 803. Harvy v. Oswald, Cro
Eliz. 572. Pennant's case, 3 Rep. 64

for which the demand was made is no bar, because it was a duty owing to him. (q) So bringing an action for the rent will not preclude an entry: but distress being an acknowledgment *prima facie* of the tenancy, will do so. (r) But if there be a condition of re-entry in case the rent shall not be paid in twenty-one days after the rent-day, and no distress on the premises, a landlord who distrains before the expiration of the twenty-one days, but continues in possession after the twenty-one days, does not thereby waive his right of re-entry. (s)

With respect to other conditions of re-entry, acceptance of rent will not affirm the lease without notice, because such conditions being collateral may be broken without the possibility of the lessor's knowing it. (t) Notice, however, of the breach of a covenant not to alien will be intended, if the lessor receive rent from the assignee. (u)

Where (x) there was a right of re-entry for not repairing the premises, Lord Kenyon said that if the demise in ejectment had been laid at a day antecedent to the payment of rent, he should have held the receipt of rent a waiver: but as the receipt of rent was prior to the demise in the ejectment, and especially as the premises were not in repair at the time of the action brought, the forfeiture was not waived thereby.

If a lessee exercises a trade which by the terms of the lease gives a title of re-entry to the lessor, the delay to take advantage of it does not waive the forfeiture: but there must be some act, such as receiving rent to confirm the tenancy. So if the lessor permit the lessee to expend money in improvements, with a view to the premises being so occupied, it is evidence to be left to a jury of his consent to the alteration. (y) So a lessor, having a right of re-entry on a breach of covenant not to underlet, does not by waiving his right on one underletting, waive his right to enter on a subsequent underletting. And the same law is of a breach of a covenant to repair: for a waiver does not amount

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| (q) Green's case, Cro. Eliz. 3. | (u) Fox v. Whichcote, Cro. Jac. |
| (r) Co. Litt. 111. 1 Leon. 262. 3 Salk. 3. | 398. |
| (s) Doe d. Taylor v. Johnson, 1 Stark. N. P. C. 411. | (x) Fryett d. Harris v. Jefferys, 1 Esp. N. P. C. 392. |
| (t) Marsh v. Curtis, Cro. Eliz. 528. | (y) Doe d. Shophard v. Allen, 3 Taunt. 78. |

to a licence, neither is it to be interpreted according to the same rules. (2)

If a lease for years be made by a stranger as lessor to the owner of the land, with a condition of re-entry, such a condition would be void *ab initio*: for such a re-entry would terminate the lease, which is good only by estoppel; and when the lease was gone, the lessee would be in of his old estate, which is a better title than that of the lessor. But where (a) land was sequestered in Chancery, and A. the servant of the owner was put in possession, and afterwards being dispossessed, accepted a lease from the disseisor, with such a condition the entry of the disseisor was held lawful: for when the sequestrator accepted the lease, he waived his first possession; and consequently the disseisor after entry had the elder title, because he had a good possession against all except the disseisee.

Where (b) a person having a right of entry does any act by which the person in possession might have an action against him, if he were a stranger; rather than that such act shall be considered tortious, the law will refer it to his right, and intend that he did it in exercise of such right. Where (c) therefore the owner of the fee granted a license to work mines, and the grantees covenanted to work them effectually; and in failure of performance of any of the covenants in the indenture a clause of re-entry was reserved to the grantor; and afterwards the grantees having discontinued working without any obvious cause preventing them the grantor after a lapse of some time verbally authorized other persons to dig, and met those persons on the land, and pointed out the boundaries, and entered into a mining adventure, with many other acts of a similar nature: it was held that they amounted to a re-entry, because, unless referred to the exercise of his right, they would have been acts of trespass.

It seems to be clear that a lessor entering for condition broken is entitled to emblements. (d)

Where (e) there is a lease for years with condition to be void

(2) *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

(a) *Hawkins v. Stephen*, Palm. 166.
London v. James, 1 And. 128. *James's case*, S. C. Moor. 181.

(b) *Plow. 92.*

(c) *Doe d. Hanley v. Wood*, 2 B. and A. 725.

(d) *Nicholas v. Simonds*, 2 Roll. Rep. 468.

(e) *Moor. 87. pl. 218. Butsee Prest. Sheph. T. 284.*

on non-payment of rent, or the breach of any covenant, the lease becomes thereby so void, that the tenant after breach of the condition is mere tenant at sufferance, and therefore ejectment may be brought without notice.

If a lease for life is made reserving rent upon condition that if the rent be behind, the lessor and his heirs may enter and hold till satisfied, the lessor on entry has only a chattel, and the freehold in the mean time remains in the lessee, and when the lessor is satisfied the lessee may re-enter. The profits also being accounted satisfaction, the lessor can bring no action of debt for rent during his occupation; because he holds the land as a distress, though he take the profits to his own use. (*f*)

II. Where a term has been demised for a term of years certain, no notice is necessary at or before the end of the term, to put an end to the tenancy; because both parties are aware of the period fixed for its determination; (*g*) and the landlord therefore may bring an ejectment against the tenant holding over without notice; neither will the circumstance of giving a notice subsequent to the determination of the term of itself be a recognition of a tenancy from year to year, for it may be considered as a mere demand of the possession; and as the landlord need not have given any notice at all, the circumstance of having given one shall not prejudice him. (*h*)

Where (*i*) a tenant agreed by parol to rent a house from year to year, for the residue of a term which was then for three years and three quarters unexpired, and he held for three years and a quarter; it was held that, though he might perhaps have been entitled to quit without notice at the end of the three years, yet his remaining longer implied a contract for the residue of the term.

It is not however unusual to make a special provision by way of conditional limitation of the estate, that a term shall be determined by notice; and the notice to be given in such cases must be determined by the apparent intention of the parties. Where (*k*)

(*f*) Litt. s. 327. Co. Litt. 203.

(*g*) *Sauvage v. Dupuis*, 3 Taunt.

(*g*) *Roe d. Jordan v. Ward*, 1 H. Bl. 410.

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(*h*) *Roe d. Bamford v. Hayley*, 12

(*k*) *Dec d. Godsall v. Inglis*, 3 Taunt. East. 464.

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therefore a lease was made for 21 years, with a proviso to determine the lease at the end of seven or fourteen years, at the desire of either party, his executors or administrators, the question was whether this warranted a notice by the devisee of the lessor who became entitled to the reversion. The court held that a literal construction of the proviso could in no case be intended: but that the reasonable construction was that it should extend to all representatives. The object of the proviso was that the inheritance should not be bound on the one hand against the will of the persons to whom the inheritance belonged, and that on the other the lessee and those claiming under him should not be bound against their will, but that in all instances the parties interested should have power to give the necessary notice for this purpose.

Where (l) a lease for years was made, with a proviso that in case the testator or lessee, or their respective heirs and executors, should wish to determine the lease at the end of fourteen years, and should give six months' notice under his or their respective hands, the term should cease, and the lessor having devised his reversion to his executors as joint-tenants after his death, one of the executors only signed a notice to quit to the tenant. This was held not good, although expressed to be in the name of all the executors; because the proviso required the notice to be signed by all of them: neither could it be supported by the general rule that one joint tenant may bind his companion by an act done for his benefit; because it was not evident that the determination of the lease was for the benefit of the parties. And no subsequent recognition by those who did not sign could by relation back make it good, because it was a notice to defeat an estate. Such notice therefore ought to be good upon all parties at the time it was given: the tenant must act upon it at the time, and therefore it should be such as he could act upon with security.

Where (m) a lease for years was made with a covenant on the part of the lessee that if the lessor should during the term be desirous to take all or any part of the land for building thereon, it should be lawful for him to enter upon all or any part to make

(l) *Right d. Fisher v. Cuthell*, 5 S. 541. See *Russell v. Coggins*, 8 Ves. East. 493. 34.

(m) *Doc d. Wilson v. Abel*, 2 M. and

such buildings as he should think proper, and to do all necessary acts provided the lessor gave six months' notice of his intention. The reasonable construction of this proviso was that the lease should after notice terminate for so much as the notice should refer to, and consequently that the lessor was not precluded from giving notice of his intention to take the whole at one time for building.

Where (o) one seized of lands in borough English, and also of other lands of freehold tenure at the common law, leased both with a covenant from the lessee, that if the lessor, his heirs and assigns, would have back the land, then upon a year's warning the lease should be void; on the death of the lessor, it was held that each kind of heir should have advantage of the limitation for his respective part; and afterward the heir in borough English having purchased the portion of his elder brother, it was held that he should have advantage of the condition in the part so purchased as assignee of his elder brother.

Where (p) a farm was leased for 21 years at a rent of 180*l.* *per annum*, consisting, as described in the lease, of the Town Barton and its several parcels at a certain rent, certain other closes at specified rents, and Shippen Barton with its several parcels at other specified rents, with a power to either party to determine the lease at the end of fourteen years, giving two years' notice. A notice to quit "Town Barton, &c. agreeably to the terms of the covenant," given in due time was held sufficient for the whole premises. A notice to quit a part only would have been bad.

If a tenant hold under an agreement for a lease at a yearly rent, in which it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age; the son must make his election a reasonable time after he comes of age. The delay of a year is unreasonable; if within a week or a fortnight, it would be reasonable. (q)

A proviso of this nature, or any other condition, may be dis-

(o) Anon. Godb. 2. Moor. 113.

(q) Doe d. Bromfield v. Smith, 2

(p) Doed. Rodd v. Archer, 14 East. T. R. 436.

pensed with subsequent to the making of the lease by express agreement: but if the lease is by deed, the dispensation must be also under seal; because it is in the nature of a release. Neither can such a dispensation, if not by deed, operate as a new lease, and consequently effect a surrender in law of the old one; because it would be plainly contrary to the intention of the parties. (r)

By the stat. 4 Geo. II. c. 28. s. 1. (s) it is provided that if any tenant for life or years, or any persons claiming under him, or by collusion with him, shall wilfully hold over any lands after the determination of his lease, and after demand made and notice in writing given for delivering possession thereof by his landlord, or the person to whom the remainder or reversion of such lands shall belong, (t) or his agent; then he shall pay for the time that he shall so keep possession to the landlord, his executors, administrators, or assigns, (u) at the rate of double the yearly value of the said lands to be recovered in any of his Majesty's courts of record by action of debt (or trespass in Ireland) (x) whereunto the defendant shall be compelled to give special bail; against the recovering of which said penalty there shall be no relief in equity.

This statute is a remedial act; and therefore a receiver of the court of Chancery is an agent lawfully authorized within the meaning of the act, and his notice in writing has been held to be a sufficient demand of the premises. (y)

So one tenant in common may bring an action for the double value for his moiety alone. They may sever in ejectment, and, as the present action is in lieu of ejectment, and more beneficial, one tenant in common may take the benefit of it without the other. (z)

If the lessee is a feme sole, and subsequent to demand of the possession she marry, there is no necessity to give a new notice to quit to the husband. Great inconvenience might arise if a fresh notice were necessary in such cases, since the landlord may not

(r) *Goodright d. Nicholls v. Mark*, 4 M. and S. 30.

(s) Irish Stat. 11 Ann. c. 2.

(t) These words not in the Irish stat. 11 Ann. c. 2.

(u) The words "or to such person to whom the immediate reversion ex-

pectant on the determination of the lease shall belong" are here added in the Irish stat. 11 Ann.

(x) See Irish stat. 11 Ann. c. 2. s. 1.

(y) *Wilkinson v. Colley*, 5 Burr. 2694.

(z) *Cutting v. Derby*, 2 Bl. 1077.

know whether the tenant is married or not; and if a man marry a woman who is tenant to another, he is bound to inquire the conditions under which she holds the estate. (a)

Where (b) the landlord declared in debt, 1st, for the double value; and, 2dly, for use and occupation; and the tenant pleaded *nil debet* to the first, and a tender of the single rent to the second count, and paid the money into court which the plaintiff took out before trial: it was held that it was still competent for the plaintiff to proceed for the double value; for the acceptance of the single rent did not waive the action, and if he proceeded, it would be evident that he only took it as satisfaction *pro tanto*. Although the single rent was paid on the second count; yet, if the plaintiff had recovered on the first, the defendant would have been entitled to have had it deducted out of the larger sum recovered.

A tenant holding over under a fair claim of right is not within the act; although it be decided eventually that he has no right. (c)

An administrator of an executor cannot sustain an action under the statute, without taking out administration *de bonis non* to the first testator. (d)

The notice under the statute may be before the expiration of the lease; and it has been held (e) that a notice in the following form, "I give you notice to quit, or I shall insist on the double rent," instead of double value, is a good notice, and plainly relates to the statute. So where (f) a landlord gave notice to the tenant to quit at the end of the lease, and he held over, a subsequent notice to quit or pay double rent did not waive the first or the double rent. The demand may be made six weeks after the end of the lease, if the landlord have done nothing to acknowledge the tenancy: but if he demand in the middle of a quarter, he can only recover single rent for the antecedent portion of the quarter. (g)

Debt for double value will not lie against a weekly tenant for holding over: for, although such a tenant may be called a tenant for years for some purposes, yet the stat. 4 Geo. II. being a penal

(a) *Lake v. Smith*, 1 N. R. 174.

(b) *Ryall v. Rich*, 10 East. 48.

(c) *Wright v. Smith*, 5 Esp. N. P. C. 283.

(d) *Cutting v. Derby*, 2 Bl. 1075.

(e) *Doe d. Mathews v. Jackson*,

Dougl. 175.

(f) *Messenger v. Armstrong*, 1 T. R. 53.

(g) *Cobb v. Stokes*, 8 East. 358.

statute, it must be construed strictly, and therefore cannot include a tenant for any less time than a year. (*h*)

In the case of tenant from year to year, if either party wish to determine the tenancy after the commencement of the current year, there must be half a legal year's notice to quit by parol or in writing, and not six months' notice only before the expiration of that year. (*i*)

To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit, if in writing, must be signed by all the joint tenants at the time it is served: (*k*) but if the notice be given by an agent, it is sufficient, if his authority be subsequently recognized. (*l*) So, in the case of an ejectment by a corporation against a tenant from year to year, a notice given by a person acting as steward is sufficient, without evidence that he had authority under seal; because the corporation by bringing the ejectment adopt the act. (*m*) If, however, several joint tenants demise from year to year, such as give notice to quit may recover their respective shares in ejectment on their several demises. (*n*)

A receiver appointed by the court of Chancery, with a general authority to let lands from year to year, seems also to have authority to determine such tenancy by a regular notice to quit. (*o*)

A misdescription of the premises in a written notice to quit is not fatal, if they are otherwise so sufficiently designated, that the party to whom the notice is given is not misled by it. It is sufficient therefore, if the premises be described as the premises which "you (*the tenant*) hold of me (*the landlord*)."
(*p*) A notice to "quit house, land and premises with the appurtenants" will include "tithes" where all are leased together. (*q*)

A notice to quit on one of two days is sufficient, if given half a year before the tenancy commenced. (*r*) And a notice

(*h*) *Lloyd v. Rosbee*, 2 Campb. N. P. C. 453.

(*i*) *Parker d. Walker v. Constable*, 3 Wils. 25. Year-book, 19 Hen. VIII. 15. b.

(*k*) 5 Esp. 149.

(*l*) *Goodtitle d. King v. Woodward*, 3 B. and A. 689.

(*m*) *Roe d. Dean and Chapter of Rochester v. Pierce*, 2 Campb. N. P. C. 96.

(*n*) *Doe d. Whayman v. Chaplin*, 3 Taunt. 120.

(*o*) See 12 East. 57.

(*p*) *Doe d. Cox v. —*, 4 Esp. N. P. C. 185.

(*q*) *Doe d. Morgan v. Church*, 3 Campb. N. P. C. 71.

(*r*) *Doe d. Mathewson v. Wightman*, 4 Esp. N. P. C. 5. *Doe d. Hinde v. Vince*, 2 Campb. N. P. C. 256.

to quit at Lady-day or Michaelmas *prima facie* is new Lady-day or Michaelmas: but is open to explanation to mean Old Lady-day or Old Michaelmas. (s) If the tenant disputes the time when his tenancy commenced, it is incumbent on him to shew the true time, and not the lessor: but mere notice to quit at a certain time given by the landlord is not a sufficient evidence of the expiration of the holding at that time. So if the tenant, on being applied to respecting the commencement of his holding, informs the party applying that it began on a certain day, and notice to quit on that day is given at a subsequent time, he shall be bound by the information he gave, and not be permitted to shew its commencement at a different time. (t) Where there is any doubt, the better way is to give a notice to quit at the end of the current year of the tenancy, which shall expire next after the end of one half-year from the service of the notice. (u) But in this case the landlord must give some evidence of the commencement of the tenancy, so as to satisfy the court that the current year has expired before the day of the demise in the declaration; as for instance where the landlord proved that the rent was due at Michaelmas and Lady-day; and yet it was the custom of the country to hold from Lady-day to Lady-day. (x) A notice delivered to a tenant at Michaelmas 1795, to quit at Lady-day, which will be in the year 1796, was held to be a good notice to quit at Lady-day 1796. The words "will be" shewed that 1795 could not be meant; and therefore it was rejected as impossible. (y)

If tenant from year to year assigns over, the tenancy of the assignee commences with the same day as the old tenancy, and therefore notice to quit on that day is sufficient. (z) If a tenant enters in the middle of a quarter, and afterwards pays for the time to the beginning of a succeeding quarter, from which time he pays half-yearly, his tenancy commences from the regular quarter day to which he paid up, and notice to quit must have relation to that day. (a)

If notice to quit at Midsummer be given to a tenant holding

(s) 2 Campb. 254.

(t) Doe d. Eyre v. Sambly, 2 Esp.

N. P. C. 677.

(u) Doe d. Phillips v. Butler, 2 Esp.

N. P. C. 589.

(x) Adams' Eject. 277.

(y) Doe d. Duke of Bedford v.

Kightley, 7 T. R. 63.

(z) Doe d. Castleton v. Samuel, 5

Esp. N. P. C. 172.

(a) Doe d. Holcomb v. Johnson, 6

Esp. N. P. C. 10.

from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he make no objection when served. (b) But if the tenant be personally served with notice to quit at Michaelmas, or at the time he usually paid rent, and he make no objection at the time, it is *prima facie* evidence that his tenancy commenced at that time. (c) Lord Ellenborough, C.J. said it was a question for the jury to determine whether the tenant must not be understood, from the circumstance of not making any objection, as having admitted that the tenancy was determined by the notice. (d)

Where the incoming tenant enters upon different parts of the demised premises at different times, half a year's notice before the substantial time of entry is sufficient. (e) In many counties it is usual for the incoming tenant to enter upon the arable land, for the purpose of ploughing and preparing it before the time limited for the commencement of the tenancy; and therefore where (f) it was agreed that the tenant should enter on the tillage lands at Candlemas, and on the house and all the other premises at Lady day following, and that when he should leave the farm he should quit "at the times aforesaid," and the rent was reserved payable at Lady day and Michaelmas, the substantial time of entry was held to be Lady day, from which time the rent was made payable. So where (g) the tenant entered his farm on an agreement to hold the arable land from Candlemas, the pasture from Old Lady day, and the meadow from Old May day, the rent having been reserved payable at Old Lady day, the substantial entry was held to be at that time. Where house and land are let together to be entered at different times, it is always matter to be left to the jury to determine in the absence of any express stipulation between the parties which is the principal, and which the accessorial subject of demises. It must in all cases depend on the relative value of the land and the house. (h)

(b) *Oakapple d. Green v. Copous*,
4 T. R. 361.

(c) *Doe d. Clarges v. Foster*, 13
East 405. *Doe d. Leicester v. Biggs*,
2 Taunt. 109. *Doe d. Baker v. Womb-*
well, 2 Campb. N. P. C. 559.

(d) *Oakapple d. Green v. Copous*,
4 T. R. 361.

(e) *Doe d. Daggett v. Snowdon*, 2
Bl. 1224.

(f) *Doe d. Strickland v. Spence*,
6 East. 120.

(g) *Doe v. Snowdon*, *supra*.

(h) *Doe d. Heapy v. Howard*, 11
East. 499.

Where (*h*) premises are taken under an agreement, by which the tenant is always subject to quit at three months' notice, this constitutes a quarterly tenancy, which may be determined at the same time of the year it commenced, or on any corresponding quarter-day. If the tenant under such an agreement enters in the middle of the usual quarters, if there appear to be no agreement to the contrary, he will be presumed to hold from the day he entered; and the tenancy can only be determined by a notice expiring on that day of the year, or some other quarter day, calculated from that day. (*k*)

Where (*l*) it was alleged to be the custom of the country to give a year's notice, Lord Kenyon hesitated as to pronouncing it a good custom. "Lord Mansfield," he observed, "had thought that three months' notice was sufficient upon a special custom; and that sitting at *Nisi Prius* he would not say otherwise: but there must be very strong evidence to support it."

In the case of houses in cities or towns, a quarter's notice seems to be sufficient: which quarter must expire with the current year of the tenancy. (*m*) Lodgings are also an exception: they may be taken for a month or a less time, and much less notice will be sufficient. On a monthly hiring a month's notice is sufficient: (*n*) so a week's notice is good to a weekly tenant. (*o*)

Where (*p*) there was an agreement for a demise for a year, the rent to be paid weekly, and a month's warning if no default in payment of rent, and the lessor afterwards refused to execute the agreement, but the tenant entered and paid weekly, he was held entitled to a month's notice, although the agreement was not executed; and although it was admitted that a week's notice was sufficient for a weekly tenant.

Notice to quit may be given to a tenant by parol; and, where two hold in common, notice to one is sufficient, because it will be presumed that he informed his companion. (*q*) So a notice to

(*h*) Doe d. Lord Bradford v. Watkins, 7 East. 551.

(*k*) Kemp v. Derrett, 3 Campb. N. P. C. 510.

(*l*) Doe d. Henderson v. Charnock, Peak. N. P. C. 4.

(*m*) Doe d. Pitcher v. Donovan, 4 Taunt. 555.

(*n*) Doe d. Parry v. Harrell, 1 Esp. N. P. C. 93.

(*o*) Right d. Flower v. Darby, 1 T. R. 159.

(*p*) Doe d. Peacock v. Raffan, 9 Esp. N. P. C. 4.

(*q*) Doed. Lord Macartney v. Crick, 5 Esp. N. P. C. 196.

quit served on one of two tenants who held under a joint demise is evidence that it reached the other, though he lived elsewhere. (r)

The mere leaving a notice at the house, without proving the delivery to a servant, or that it came to the tenant's hand, will not support an ejectment. (s) But where the tenant has a dwelling-house off the premises, delivery to the servant at the dwelling-house is strong presumptive proof that the master received the notice. (t)

It is not necessary that a notice to quit should be directed to the tenant in possession, if it be proved to have been delivered to him in proper time. (u) So if the notice misdirect the Christian name of the tenant, and the tenant keep it, this is a waiver of any objection; and the lessor may recover, if he have no other tenant of the same name. (x)

A tenancy from year to year cannot be determined by parol licence to quit in the middle of a quarter, although the tenant quit accordingly. (y) But if, at the end of the year, the landlord accept another as his tenant, such acceptance is a dispensation of the notice to quit, and the landlord cannot recover against the former tenant for use and occupation subsequent to his quitting. (z)

Where rent is reserved quartely, it does not dispense with the half-year's notice: but where (a) three months' notice was given by the lessee, and the lessor accepted rent to the time when the tenant quitted the premises, without saying any thing, it was held to be a waiver of the regular notice.

Acceptance of rent after the expiration of the notice to quit seems to be generally considered a waiver of such notice; (b) or rather it is matter of evidence to the jury of (c) such waiver: (d)

(r) Doe d. Lord Bradford v. Watkins, 7 East. 551.

N. P. C. 103.

(s) Doe d. Buross v. Lucas, 5 Esp. N. P. C. 153.

(z) Sparrow v. Hawkes, 3 Esp. N. P. C. 504.

(t) Jones d. Griffiths v. Marsh, 4 T. R. 464.

(a) Shirley v. Newman, 1 Esp. N. P. C. 266.

(u) Doe d. Mathewson v. Wrightman, 4 Esp. N. P. C. 5.

(b) Goodright d. Charter v. Cordwent, 6 T. R. 219.

(x) Doe v. Spiller, 6 Esp. N. P. C. 70.

(c) Doe d. Ash v. Calvert, 2 Campb. N. P. C. 387.

(y) Mollet v. Brayne, 2 Campb.

(d) Doe d. Cheney v. Batten, Cowp. 245.

but where rent was usually paid at a banker's, and the banker without any special authority received rent accruing after the expiration of the notice, it was held to be no waiver.

Where (e) the landlord, about to sell the demised premises, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless the premises were sold: this promise was held to be no waiver; nor did it operate as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary. So where (f) the landlord had given notice to quit different parts of the farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the same times respectively in the following year, but continued to proceed in his ejectment; this second notice did not waive the first.

The mere acceptance of money is equivocal: but a distress for rent due after the expiration of the notice is a waiver as much as the acceptance of rent *eo nomine*. (g) But if, after the expiration of a notice to quit, the landlord gives a fresh notice that unless the tenant quits in fourteen days he will require the double value, this is no waiver of the first notice. (h)

Where (i) a notice to quit given by a rector to the tenant of his glebe land expired on the 25th December, and on the 17th January following a sequestration was read in the church, and the rector afterwards, by order of the sequestrator, received from the tenant who held over a weekly allowance, which he described in a receipt, as issuing out of the tithes and glebe: it was held that the rector might, notwithstanding, maintain an ejectment, laying the demise on the 1st January, as between the 25th December and the 17th January the tenant was a trespasser. This is like the case of a tenant for life dying pending an ejectment. The rector cannot have an *habere facias possessionem*: but he may recover the profits of the land up to the time of the se-

(e) *Whiteacre d. Boulton v. Symonds*, H. Bl. 311.
10 East. 13.

(h) *Doed. Digby v. Steel*, 3 Campb.

(f) *Doed. Williams v. Humphreys*, N. P. C. 115.
2 East. 237.

(i) *Doed. Morgan v. Black*, 3
Campb. N. P. C. 447.

(g) *Zouch d. Ward v. Willingale*, 1

questration by this ejectment. This point was ruled by Dampier, J. at *nisi prius* : but it was afterwards confirmed on a motion for a new trial by the court of King's Bench.

Since there is no privity between the ultimate reversioner and the underlessee, if the lessee underlets from year to year the underlessee is not entitled to any notice after the interest of his immediate lessor is determined. And if the undertenant refuse to give up the possession, the ejectment may still be brought against the original lessee for so much as the undertenant occupies, although after the notice given to him by his own landlord he has given a regular notice to the undertenant ; and, upon the writ of execution, the sheriff will turn the undertenant out of possession. And the intermediate tenant will be liable to the costs of the action. (j) So in the case of a bargainee of tithes for one year, who underlets them to the several occupiers of the land, no notice need be given by a succeeding bargainee of the same tithes for the following year, because the first bargainee could give no greater interest than he himself possessed. (k) If, however, a composition has been made for tithes by A. as proprietor, and he lease them to B., whose interest is afterwards determined by A., before any alteration in the composition by B., A. cannot determine the composition without half a year's notice. Such notices are strictly analogous to notices between landlord and tenant. (l)

An ejectment may be brought by the assignee of a mortgage without notice, against one who was let into possession as tenant from year to year after the mortgage, but before the assignment : a mortgagor himself in such a case is not entitled to notice ; and, therefore, he cannot convey a greater interest to the lessee. (m) So the original mortgagee may bring ejectment without notice against a lessee of the mortgagor from year to year, under a demise made subsequent to the mortgage without his privity. (n)

But where one claims the reversion under the lessor, he must give a notice, in all cases in which notice is requisite, in the same

(j) *Roe v. Wiggs*, 3 N. B. 330.

(k) *Cox v. Brain*, 3 Taunt. 95.

(l) *Wyburn v. Tuck*, 1 B. and P. 459. *Hewitt v. Adams*, Dom. Proc.

1782. *Rayner on Tithes*, 992.

(m) *Thunder d. Weaver v. Belcher*, 3 East. 449.

(n) *Keech d. Warne v. Hall*, Dougl.

21.

way as the original lessor ought to have done ; and no favour in this respect is shewn to infancy or coverture. (o) Neither will a refusal to pay rent to a devisee under a will, which is contested, be a sufficient disavowal of title to enable the devisee to maintain ejectment without notice. (p)

Where (q) a tenant came into possession in 1816, and the lessor of the plaintiff claimed under a writ of elegit, and inquisition issued thereon in 1818, but founded on a judgment recovered prior to 1816 ; the judgment was held to have so bound the land that the tenancy was avoided *in toto* by the relation of the elegit to the judgment ; and no notice to quit, therefore, was necessary to maintain ejectment under it.

A notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness ; or his absence must be accounted for : which point is among the first principles of evidence ; and, therefore, proof of service on the tenant, and that he read it, and did not object, is not sufficient without the preliminary proof above mentioned. (r)

In ejectment against a lessee of tithes for holding over after notice to quit, it was held that some evidence must be given to shew that he did not mean to quit possession ; as, for instance, his declaration to that effect, or his silence, when questioned ; or, perhaps, by shewing that the defendant, who claimed by assignment from the original lessee, entered into the rule to defend the ejectment as landlord. But a second notice to him was held a waiver of a former notice given to the original lessee before assignment. There could be no actual delivery up of such a possession : the landlord, however, could bring it to the test, by demanding what the intention of the tenant was. (s)

When a lease has expired, the tenant continues liable to the rent, unless he delivers up complete possession, or the landlord accepts another in his room : but where the lessor attested a paper from the lessee to the undertenant, giving him a notice that the lease was expired, Lord Kenyon held that it was not

(o) *Maddon d. Baker v. White*, 2 and A. 782.

T. R. 159.

(r) *Doe d. Sykes v. Darnford*, 2 M.

(p) *Doe d. Williams v. Pasquali*, and S. 62.

Peak. N. P. C. 198. Bull. N. P. 96.

(s) *Doe d. Brierly v. Palmer*, 16

(q) *Doe d. Putland v. Hilder*, 2 B. East. 53.

sufficient to bind the lesser, unless it was proved that he knew the contents. (t)

Where (u) tenant from year to year underlet part of the premises, and then gave up to the landlord the part remaining in his own possession, without either receiving a regular notice to quit, or giving the underlessee notice to quit, or even surrendering a part in the name of the whole: it was held that the landlord could not recover against the underlessee upon giving half a year's notice in his own name; because the tenancy between the intermediate lessee and his tenant still continued, and there was no privity of contract between the landlord and the under-tenant.

The following may be used as forms of notices to quit:—

Sir,

I hereby give you notice to quit and deliver up on the day of next, the possession of the messuage or dwelling house, (or "farm, lands, and premises,") with the appurtenances, which you now hold of me, situate in the parish of in the county of Dated the day of

Yours, &c.,

A. B.

To Mr. C. D. (the tenant, or if it be doubtful who is the tenant)

To C. D., or whom else it may concern.

If the notice be given by the agent, the form may easily be varied by stating that circumstance, and by the agent signing "as agent to the landlord."

Where the commencement of the tenancy is doubtful, the following form may be used:—

Sir,

I hereby give you notice, &c. (as before to the date of the notice,) provided your tenancy originally commenced at that time of the year; or otherwise that you quit and deliver up the possession of the said messuage, &c., (as above) at the end of the year of your tenancy, which will expire next

(t) *Harding v. Crothorn*, 1 Esp. N. P. C. 57.

(u) *Pleasant d. Hayton v. Benson*, 14 East 234.

after the end of half a year from the time of your being served with this notice. Dated, &c.

When a tenant from year to year gives the notice to his landlord, the form may be easily varied.

Where tenants, having power to determine their leases by giving notice to their landlords of their intention to quit, give such notice, and do not accordingly deliver up the possession at the time mentioned in the notice, they are liable by the stat. 11 Geo. II. c. 19. s. 18. (x) to double rent, to be levied, sued for, and recovered at the same times, and in the same manner, as the single rent might have been levied, sued for, and recovered, before the giving of such notice; and such double rent shall continue to be paid during all the time such tenant shall continue in possession. By the Irish stat. 15 Geo. II. c. 8. s. 8. the notice given by the tenant must have been by writing: but that is not required by the English act, where it has not been expressly stipulated for. (y) A notice that the tenant will quit "as soon as he gains another situation" does not bring the case within the statute. (z)

With respect to leases at will, strictly so called, it has been formerly observed if the lessor does any act inconsistent with the continuance of the will, it determines the tenancy from the time the tenant has notice: but an outlawry does not determine the will till seizure, nor an extent till the liberate. (a)

If the lessor, having made a lease at will, make a lease for years by deed to commence immediately, this will determine the will, although it be agreed between him and the lessee for years that he shall not enter for some time after: but since a lease may commence in computation of time before it begins in interest, a lease to begin at Midsummer in point of time, and in interest at Michaelmas, does not seem to have the effect of determining the will before Michaelmas; and, therefore, if the lease for years is by parol, the collateral agreement will be material. (b)

(x) Irish stat. 15 Geo. II. c. 8. s. 8.

(y) See *Timmins v. Rowlinson*, 3 Burr. 1603.

(z) *Farrance v. Elkington*, 2 Campb. 591.

(a) *Hinchman v. Isles*, 1 Vent. 247.

(b) *Hinchman v. Isles*, 1 Vent. 247. *Dimsdale v. Isles*, Raym. 224. 3 Lev. 38. 3 Keb. 207.

forfeiture of the estate of the tenant may take place by *disseisin* in law, which is inconsistent with the interest supposed to be demised. A feoffment by tenant for life, if it be for another's life than the *cestui que vie*, is a forfeiture of his estate; and so a feoffment by a tenant for years is a forfeiture, because it creates a freehold by *disseisin*. (c) So if the tenant for years make a feoffment, the lessor being upon the land, this is a good feoffment, and a cause of forfeiture accordingly. (d) So also, although a lessee cannot divest a freehold in the crown, yet a feoffment is a forfeiture, because it tends to the king's *disherison*. (e) If tenant for life and remainder for life join in a feoffment in fee, it is a forfeiture of the remainder for life, as well as of the particular estate: for, where the estate is wrongfully made, it shall be accounted the livery in law of all who join. (f) But conveyances which merely operate by grant, such as lease and release, create no forfeiture because they convey no more than the party is entitled to grant. (g)

So if the lessee sues a writ, or resorts to a remedy which claims or supports a right to a greater estate of freehold than he possesses, it is a forfeiture; or if, in an action grounded on the lease, he resists the demand under the pretence of a higher interest in the land, or if he acknowledges the fee in a stranger, he is in these cases estopped by the record from claiming under the lessor. (h) A common recovery accordingly by tenant for life or years or his being vouched in the same is a forfeiture. (i) So where the lessor had bargained and sold the reversion to the plaintiff, and the defendant pleaded that the lessor, before the grant to the plaintiff, had bargained and sold the reversion by deed inrolled to the defendant, it was adjudged a forfeiture. (j)

If a fine be levied, it is a forfeiture, although there be no previous feoffment by tenant for years to create a freehold by *disseisin*: but if there be such a freehold to support the fine, an entry is necessary

(c) Sand. on Uses, tit Feoff.

(d) Read v. Errington, Cro. Eliz. 321. Metteford's case, Dy. 362. b.

(e) Co. Litt. 251. b.

(f) 1 Leon. 362.

(g) Smith d. Richards v. Clifford, 1 T. R. 738.

(h) Dicksey v. Spenser, 3 Leon. 169.

Moor. 211. Gouldsb. 40. Godb. 105.

Barkhouse's case, 4 Leon. 3. Dy. 209. pl. 21. in marg. 2 Lev. 52. Co. Litt. 339.

(i) Page v. Griffith, Moor. 271.

Pelham's case, 1 Rep. 15.

(j) Dixie's case, Moor. 211.

to avoid the fine. If, however, the lessor does not enter during the lease, it seems that he is entitled to five years after the term ended to avoid it. If the reversion be granted over before entry, the forfeiture cannot be taken advantage of by the entry of the grantee: or, in other words, a right of entry cannot be transferred. (k) If the lessee for years levies a fine with proclamations, and during the five years pays rent to the lessor as before, this fine will not bar the lessor. (l)

Where (m) a tenant for life leased for years, and afterwards the tenant for years being ousted, and the tenant for life disseised, the tenant for life levied a fine to the disseisor, this was held sufficient to give a title of entry to the reversioner. So a fine by tenant for life, although it has no operation, will equally create a forfeiture as if he levied it.

A fine levied by tenant for life in remainder is a forfeiture of his estate. (n) So a fine *come ceo*, &c. by tenant for life is a forfeiture, although no use be declared of it: but it is otherwise with a fine *sur concessit*, because no use results as in the other case. (o)

Where (p) a fine is levied of a trust estate by tenant for life, a court of equity will never construe it to work a wrong: but it will, notwithstanding, operate so as to grant all the consignor had the power to grant. And where tenant for life of the legal estate mortgaged his estate by making an underlease for years, and levied a fine to the mortgagee and his heirs to corroborate the mortgage, and afterwards to the use of the tenant for life and his heirs. The mortgagee not having notice of the title of tenant for life was held entitled to hold, during the life of the mortgagor, although the reversioner had recovered at law. (q)

In all the cases above mentioned no notice is necessary in order to terminate the interest of the lessee; but the landlord must bring his ejectment to recover possession.

(k) *Whaley v. Tancred*, Tho. Raym. 219. 4 Leon. 250.

(l) *Farmer v. Smith*, 2 And. 176. *Farmer's case*, 3 Rep. 77. b. S. C.

(m) *Buckley v. Hardy*, 2 And. 29.

(n) *Holt v. Lister*, Cro. Eliz. 757.

(o) *Rumsey v. Watson*, 3 Keb. 333, 436, 448.

(p) *Lethuillier v. Tracy*, 3 Atk. 729.

Penhay v. Hurrall, 2 Freem. 213.

Lady Whetstone v. Bury, 2 P. Wms. 148.

(q) *Willis v. Fineux*, Prec. in Ch. 108. See *Lady Whetstone v. Sainsbury*, Prec. Ch. 591. *contra*.

(r) No Irish Stat. of this kind.

By the stat. 11 Geo. II. c. 19. s. 16. (r) if any tenant holding at rack rent, or a rent of full three-fourths of the yearly value of the demised premises, shall be in arrear for one year's rent, and shall desert the demised premises, and leave the same uncultivated and unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, two or more Justices of the peace of the county, division, or place, (having no interest in the demised premises,) at the request of the landlord, may go upon and view the same, and affix, or cause to be affixed on the most notorious part of the premises, a notice in writing, what day (at the distance of fourteen days at least), they will return to take a second view thereof; and if, upon such second view, the tenant, or some person on his behalf, does not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices are empowered to put the landlord in possession; and it is enacted that the lease as to any demise therein contained shall be thenceforth void. The proceedings of such justices are examinable in a summary way by the next justice or justices of assize, of the respective counties in which such lands lie, and if they lie in the city of London, or in the county of Middlesex, by the Judges of the court of K. B. or C. B., or if in the counties Palatine of Chester, Lancaster, or Durham, then before the Judges thereof, and in Wales before the proper court of Great Session. All these courts are empowered to order restitution to be made to the tenant, with his expenses and costs to be paid by the landlord, if they see cause for doing so; and if they confirm the act of the justices, they may award costs, not exceeding five pounds for the frivolous appeal. By the stat. 57 Geo. III. c. 52. this remedy is extended to cases, where such tenants are in arrear for one half year's rent instead of a whole year.

The landlord may properly proceed under this act, although he know where the tenant is, and although the justices find a person in possession when they first go to view the premises. Neither is it necessary to state in the record of the proceeding by the Magistrates that the landlord has a right of re-entry, although such a right must exist in order to entitle the landlord to proceed under this statute. (s)

(s) *Ex parte Pilton*, 1 B. & A. 369.

IV. The action of ejectment is the proper remedy for the recovery of the possession by the tenant; and the writ of *ejectione firmæ* lies against any one who has ousted the tenant, whether it be the lessor himself or any stranger: and formerly the tenant had likewise another writ, called *quare ejecit infra terminum*, which lay not against the lessor himself, or other ejector, but against his feoffee, which was a remedy provided by the equity of the stat. Westminster II. for the recovery of the term from the feoffee, against whom an *ejectione firmæ* could not be brought, because he was not the ejector. Since, however, the action of ejectment has been so modified as to be applicable to all cases, the writ of *quare ejectionem infra terminum* has fallen into disuse. Ejectment is also the universal remedy for the recovery of the possession of those who claim title, whether lessors or strangers.

The form of action of ejectment presupposes that the estate is of a corporeal nature; therefore, generally speaking, an ejectment will not lie of incorporeal hereditaments. It will, however, lie of tithes, both great and small, (*t*) in the hands of lay impropiators, by the purview of the statute 32 Hen. VIII. c. 7.; (*u*) and this doctrine has been since extended by analogy to tithes in the hands of the clergy. Ejectment will not lie of a piscary; (*x*) nor of a common, unless it be appendant or appurtenant: but if an ejectment be brought for common generally, it shall be intended after verdict to be such a common as ejectment may be brought for. (*y*) An ejectment will lie of a *boillourie* of salt, and of a watercourse, under the description of so much land covered with water: (*z*) it will also lie *de prima tonsura*, (*a*) or of the herbage, (*b*) and of the aftermath; (*c*) but not of pawnage. (*d*) It lies likewise of a sheepwalk by that name.

Originally when the person, having right of entry into lands, wished to recover the possession by this action, he made a formal entry into the land; and, while in possession, sealed and delivered

(*t*) *Camell v. Clavering*, 2 Lord Raym. 789. *Badwin v. Wine*, W. Jon. 321.

(*u*) Irish stat. 35 Hen. VIII. st. 1. c. 12.

(*x*) *Herbert v. Laughlyn*, Cro. Car. 492. But *quare*.

(*y*) *Newman v. Holdmyfast*, 1 Stra.

54. *Barton v. Hampshire*, 3 Keb. 738.

(*z*) *Rep. N. P. C. 428*. *Challoner v. Thomas*, Yelv. 143.

(*a*) *Ward v. Pettifer*, Cro. Car. 362.

(*b*) *Wheeler v. Toulson*, Hard. 330.

(*c*) 2 T. R. 452.

(*d*) *Running. Eject.* 433.

a lease on the premises to a third person, and having thus given him entry, left him in possession ; and he staid in possession till ousted by the former tenant, or some other person. In the fictitious action now in use the person, who is supposed to have ousted the plaintiff, is called the casual ejector. And since the lease to the plaintiff as well as his entry and ouster are mere fictions, which are admitted previous to trial, the casual ejector is also a fictitious person, and never the tenant in possession himself. Where the premises are vacant, and no tenant is in possession, it is necessary, even at the present day, to make a formal entry, and seal a lease on the premises. It is, however, a sufficient keeping of the possession of the premises if any part of the tenant's property is left by him on the premises : thus hay left in a barn is a sufficient keeping of the possession. So where (e) the lessee of a public-house took another, and removed his family and goods, but left beer in the cellar, it was held a sufficient possession to set aside a judgment obtained by the landlord as upon a vacant possession.

In cases of vacant possession the law requires a public entry in order to avoid all fraud and collusion in obtaining the possession without the knowledge of parties having right. It is a standing rule, on the same principle, that no plaintiff shall proceed in ejectment to recover the lands against the casual ejector, without notice to the tenant in possession, and permitting him to become defendant if he pleases. If the plaintiff know where the tenant has removed to, although he has left the premises in question, he must be served with notice personally ; for notice need not be given on the premises. (f) So where land is rented upon which there is no dwelling-house, if it is known where the defendant resides, he must be served with a notice at that place.

The notice is given by serving the tenant with a copy of the declaration in ejectment. The declaration should be served on the tenant in possession or his wife ; (g) or if they refuse to receive it, or if the tenant abscond, or keep out of the way to avoid being served, a copy of the declaration should be delivered to one of the family, or affixed and left on the outer door or some other conspicuous part of the premises ; and an application should be

(e) *Savage v. Dent*, 2 Str. 1064.(f) *Ibid.*(g) *Doe d. Baddam v. Roe*, 2 B. &P. 55. *Goodright d. Waddington v. Thrustout*, 2 Bl. 800. *Smith d. Lord**Stourton v. Hurst*, 1 H. Bl. 644.

made to the court that this may be deemed good service. (h) And the declaration may be affixed in like manner by the statute 4 Geo. II. c. 28. s. 2. where there is half a year's rent in arrear, and the landlord has a right to re-enter for the nonpayment of it, and no tenant is in actual possession. The notice at the foot of the declaration must be directed to the tenant in possession by name; and the Christian name as well as surname of the tenant should be inserted in the notice, and comprised in the affidavit of service. This notice should be read over to the tenant at the time of the delivery of the declaration, and he should be informed of the meaning of the service. (i)

Service of declaration on the servant, with a subsequent acknowledgment by the tenant, is a sufficient service. (k) So a service on the tenant's father, son, or daughter, with such subsequent acknowledgment, is good: (l) but it appears that the affidavit should state that the acknowledgment was before the es-woign day. (m) Where (n) the tenant and his wife had absconded, and the maid servant on whom the declaration was served made an affidavit that she gave it to her master, this was held a good service.

A declaration in ejectment may be served on the wife either on the premises, or at the husband's house: and it is necessary to state in the affidavit of service that the service was at the husband's house to shew that they were living together as man and wife. (o) But the mere acknowledgment of the wife of the tenant in possession, that she has received a declaration, which has been delivered to the niece of the tenant, will not bind the husband. (p)

Service of a declaration in ejectment on the receiver of an infant's estate, appointed by the Court of Chancery, amounts to

(h) *Kirwood v. Backhouse*, Cas. in Pr. C. P. 75. *Sprightley d. Collins v. Dunch*, 2 Burr. 1116. *Fenn d. Tyrell v. Dean*, 3 Burr. 1181.

(i) 1 Tidd. Prac. 504, 7th ed.

(k) *Anon.* 1 Salk. 255.

(l) *Roe v. Doe*, Cas. in Pr. C. P. 115.

(m) *Doe d. Maddaugh v. Roe*, 4 B. Moor. 20. *Doe d. Hambrook v. Roe*,

14 East. 441. *Smith d. Lord Stourton v. Hurst*, 1 H. Bl. 644.

(n) *Woodby v. Holdfast*, 2 Barnard. 311.

(o) *Doe d. Moerland v. Hayles*, 6 T. R. 765. *Jenny d. Preston v. Cutts*, 1 N. R. 308.

(p) *Goodfellow d. Hunt v. Biddle*, 1 B. & P. 384. *Smith d. Lord Stourton v. Hunt*, 1 H. Bl. 644.

no more than service on a bailiff; and, therefore, it is not good service. (q) A service on one of two joint-tenants in possession is service on both. (r) But where several tenants hold severally, a copy must be delivered to each. (s)

A service by nailing the declaration on the door of a barn on the premises in which the tenant had occasionally slept, there being no dwelling-house, and the tenant not being to be found at his last place of abode, has been deemed good service. (t) Service of declaration, in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledges having been informed of it, is also sufficient to entitle the plaintiff to judgment against the casual ejector. (x) So where (y) a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and appeared and pleaded, this was held sufficient evidence for a jury to find that he was tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner of the premises.

Formerly the rule to make a service of a declaration on any but the tenant and his wife good service in those cases in which such application was necessary, was prospective: but it is now settled that such a rule may relate to the service of a declaration on a day past. (z)

Where (a) the ejectment was brought for a house rented by the churchwardens and overseers of a parish, for the purpose of accommodating the parish poor, service of the declaration on the churchwardens and overseers was deemed sufficient, although they did not occupy otherwise than by placing the poor in it. And in an ejectment for a chapel the service may be made on the chapel wardens, or on the persons entrusted with the keys. (b) But

(q) *Goodtitle d. Roberts v. Badtittle*, 1 B. and P. 385.

(r) *Doe d. Bailey v. Roe*, 1 B. & P. 369.

(s) 1 Chit. Rep. 141.

(t) *Fean d. Huckle v. Roe*, 1 N. R. 293.

(u) *Doe d. Walker v. Roe*, 1 Price

Exch. Rep. 399.

(y) *Doe d. James v. Stanton*, 2 B. & A. 371.

(z) *Gulliver v. Wagstaff*, 1 Bl. 317.

Lessee of Methold v. Norright, 1 Bl. 290.

(a) 1 Tidd. Pr. 503. Barnes 181. 4to.

(b) *Runnington Eject* 134.

where (c) the ejectment is for a house, service upon the person having charge of the keys to let the house is not good, because he is a mere servant.

In Ireland if the landlord bring an ejectment for nonpayment of rent with notice of a mortgage, he must serve the mortgagee with the declaration, although the mortgage be not registered according to the Irish statute 8 Geo. I. c. 2. s. 5. (d)

In ejectment for empty houses there must be an affidavit of sealing the lease and of entry and ouster, and a peremptory rule to plead. (e) And where (f) there was a vacant possession, and a lease was sealed on the premises; and the defendant ejected the lessee, and then gave a warrant of attorney to confess judgment: this case was held not to be distinguishable from the case of a casual ejector. A notice at the bottom of a declaration in ejectment affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant, generally has been held insufficient: since, if there were representatives who had taken possession, they should have been addressed by name. If there were none, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession. (g)

If a tenant in possession leave this country and reside abroad, for the purpose of avoiding his creditors, and the premises be charged with an annuity to the lessor of the plaintiff, to whom a right has been reserved to enter, receive the rents, and sell; judgment cannot be obtained against the casual ejector on an affidavit that the declaration was duly served on the premises, and a copy thereof fixed to the outer door: nor can the service of the declaration on the solicitor of such tenant be good, unless the affidavit states that he resides abroad for the express purpose of avoiding such service. (h)

By a recent act, (i) extending both to England and Ireland, it is enacted that where the term or interest of any tenant holding under a lease or agreement in writing for any term of years or

(c) Anon. 17 Mod. 313. Runn. Eject. 155.

(d) Biddulph v. St. John, 2 Scho. and Lefr. 521.

(e) Smartly v. Headen, 1 Salk. 255.

(f) Hooper v. Dale, 1 Str. 531.

(g) Doe d. Governor of St. Margaret's Hospital, Westminster, v. Roe, 1 B. Moor. 113.

(h) Roe d. Fenwick v. Doe, 3 B. Moore 576.

(i) 1 Geo. IV. c. 87.

from year to year shall have expired, or been determined either by landlord or tenant by giving notice to quit, and such tenant or those claiming under him shall refuse to deliver up possession accordingly after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant; and the landlord shall thereupon proceed by action of ejectment for the recovery of the possession: it shall be lawful for him at the foot of the declaration to address a notice to such tenant or person requiring him to appear in the court in which the action shall have been commenced on the first day of the term then next following; or if the action shall have been brought in Wales, or in the counties palatine of Chester, Lancaster, or Durham respectively, then on the first day of the next sessions or assizes, or at the court day, or *other usual period for appearance* to process then next following (as the case may be) there to be made defendant, and to find such bail, if ordered by the court, and for such purposes as are thereafter next specified. And upon the appearance of the party at the day prescribed, or in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, and that possession has been lawfully demanded in manner aforesaid, to move the court for a rule for such tenant or person to shew cause within a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person upon being admitted defendant, besides entering into the common rule and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant, of the term next preceding the time of trial: or if the action shall be brought in Wales, or in the counties palatine, then of the sessions, assizes, or court day respectively, (as the case may be) at which the trial shall be had; and also why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum to pay the costs and damages, which shall be recovered by the plaintiff in the action.

And it shall be lawful for the court upon cause shown, or upon affidavit of the service of the rule in case no cause is shown, to make the same absolute in the whole or in part, and to order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and find such bail, with such conditions and in such manner as shall be specified in the said rule, and such part of the same so made absolute; and in case the party shall neglect so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then upon affidavit of the service of such order to make an absolute order to enter up judgment for the plaintiff.

By the fifth sect. of the same act it is provided that no landlord shall remove any action of ejectment commenced by him under the provisions of this act from any courts of Great Session in Wales, into an English county, unless such court of Great Session shall be of opinion that the same ought to be so removed upon special application for that purpose.

In all cases in which landlords shall elect to proceed in ejectment under the preceding provisions, and the tenant shall have found bail as ordered by the court, then if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him, on the merits of the case, there shall be judgment against him with double costs. (*k*)

Two cases have recently occurred upon the construction of these provisions. In the first (*l*) it was held that a tenancy, by virtue of an agreement in writing for three months certain, is a tenancy for a term within the meaning of the act: and it was likewise determined that upon a rule, calling on the tenant to enter into a recognizance, under the statute it is unnecessary to express in the rule *nisi* the amount of the security required.

In the second (*m*) of the cases alluded to it was held, that where a tenant holds from year to year without a lease, or agreement in writing, he is not within the statute; the words "under a lease or agreement in writing," being construed by Mr. J. Bailey to extend to the whole sentence.

A declaration in ejectment is considered to some purposes as process of the court; therefore, contemptuous words in the deli-

(*k*) Sect. 6.

(*m*) Dec d. Earl of Bradford v. Roe,

(*l*) Doe d. Phillips v. Roe, 5 B. and 5 B. and A. 770.

A. 766.

very or acceptance of it are a contempt of court. (n) So where, (a) in the declaration delivered to the tenant in possession, the said James instead of the said John was said to enter by virtue of the demise, the court refused to amend it, because the court considered it as process. Wright J. cited a case in Hil. T. 15 Geo. II. where the premises were laid "in Twickenham and Isleworth, or one of them;" and the court refused a motion to amend by striking out the disjunctive words. So also the defendant can only appear to the demise as laid; therefore, the declaration cannot be amended as to the time of demise, but the plaintiff must bring a new ejectment. (p) On the same principles the parcels are never permitted to be altered without consent: neither can the term be enlarged in any other manner, (q) although the plaintiff be prevented by injunction from proceeding. (r) Where, (s) however, after entry to avoid a fine, the plaintiff laid his demise before instead of after entry, the court allowed him to amend on payment of costs.

By the stat. 11 Geo. II. c. 19. s. 12. (t) the tenant, if served with a declaration in ejectment, in England, Wales, or in the town of Berwick-upon-Tweed, must give notice thereof to his landlord or his bailiff, under the penalty of forfeiting the value of three year's improved or rack rent of the premises so demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action of debt to be brought in any of the courts of record at Westminster, or in the counties of Durham, Chester, and Lancaster, or in the courts of Grand Session in Wales, wherein no essoign, protection, or wager of law, shall be allowed, nor any more than one imparlance.

This statute, however, only extends to such ejectments as are inconsistent with the landlord's title; therefore a tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee to enforce attornment is not liable to the

(n) *R. v. Unitt*, 1 Str. 507.

(a) *Goodtitle v. Meymott*, 2 Str. 1211.

(p) *Roffey and Hanbury*, 2 Barn. 76.

(q) *Anon.* 8 Med. 130.

(r) *Kesworth v. Thomas*, Andr. 808. *Puleston v. Warburton*, Carth. 401. See *Mariner v. Thurstent*, 2

Barnard. 329, and 1 *Barnard.* 251.

Dickens v. Greenville, Carth. 3. *Outen v. Shepherd*, 2 Str. 1272

(s) *Doe d. Hardman v. Pilkington*, 4 Burr. 2447.

(t) There appears to be no parallel Act in Ireland.

penalties of this section of the stat. 11 Geo. II. c. 19. Besides the statute expressly permits the tenant to attorn to the mortgagee. (u) But Sir W. D. Evans observes that the notion of bringing ejectments to compel tenants to attorn is materially altered since this decision. (x)

Where (y) the tenant under a demise of certain lands together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised, fraudulently concealed a declaration in ejectment, and suffered judgment to go against him by default; and, although the declaration did not mention mines, the sheriff in executing the writ of possession, delivered, with the connivance of the tenant, possession of the premises demised to the tenant, and also of those mines in which he had a liberty to dig: it was held that although the latter could not be recovered in ejectment, still that the tenant had by his own act estopped himself from taking that objection; and consequently that in an action for the value of the three years' improved rent the landlord might recover the treble rent in respect not only of the demised premises, but also of the mines. The improved rent meant in the stat. 11 Geo. II. is such a rent as the landlord might fairly agree upon at the time of the delivery of the declaration, if the premises were then to be let.

By s. 13. of the stat. 11 Geo. II. c. 19. the landlord may make himself defendant with the tenant if he appear; or, if he refuse, he may defend without him: and if judgment has been signed against the casual ejector, the court shall order a stay of execution till further order therein. The landlord, in the latter case, is in every respect in the place of the tenant. (z) The court will allow also a mortgagee to defend with his mortgagor: (a) but this case is not within the statute, which, as has been before observed, applies only to the relation of landlord and tenant. The principle at present adopted seems to be, that it is not every person who claims title who can be admitted under this statute to defend as landlord; but only one who is in some degree in possession as landlord: and the clause of forfeiture by

(u) *Buckley v. Buckley*, 1 T. R. A. 652.

647.

(z) *Fairclaim d. Fowler v. Earl*

(x) *Evans's Stat. Pt. IV. Cl. XIX.* Gower, 1 Bl. 357.

No. 23. n. 9.

(a) *Doe d. Kilyard v. Cooper*, 8 T. R. 645.

(y) *Crocker v. Fothergill*, 2 B. and

the tenant, if he neglect to give notice of the delivery of a declaration, is considered as confirming this doctrine. It seems to follow that where there is an undisputed demise, the question as to which of two adverse claimants is entitled to defend as landlord cannot be tried in ejectment. In *Roe d. Leak v. Doe* (b) the question arose between different devisees under conflicting wills of the lessor; and it was held that the court had no jurisdiction to admit any person to defend, except the landlord; and they thought neither of the applicants was a landlord within the act. In *Fairclain d. Fowler v. Shamtitle* (c) the ejectment was brought by a person claiming as heir, and the lord of the manor claiming by escheat applied to be admitted as landlord. After much discussion, it was entered by consent that the lord should bring the ejectment, and the person claiming as heir should defend as landlord. The cases therefore seem to establish the distinction, that a devisee who has never been in possession cannot defend as landlord; but that an heir at law or remainder-man claiming under the same title as lessor may. (d) A *cestui que trust*, who has never been in possession, has been also considered as not entitled to admission to defend as landlord. A landlord however is never compellable to defend in ejectment. (e)

If the tenant in possession or the landlord apply to be made defendant, it has long been the practice not to allow him to become so, except upon the condition that he enter into a rule of court to confess at the trial of the cause the lease, entry, and ouster of the plaintiff, and to rely solely upon the question of title. It has been, moreover, recently ordered by both the courts of K. B. (f) and C. P., (g) that in the consent rule abovementioned the defendant shall also specify in respect of what premises he intends to defend the action; and shall consent in such rule to confess upon the trial that the defendant, (*if he defend as tenant, or if he defend as landlord* "that his tenant") was at the time of the service of the declaration in possession of the premises so specified.

(b) Barnes. Suppl. 28. 8vo. Lovelock d. Norris v. Dancaster, 3 T. R. 783. See 4 T. R. 122.

(c) 3 Burr. 1290. See Evans's Stat. Pt. IV. Cl. XIX. No. 23. n. 10.

(d) Lovelock d. Norris v. Dancaster, *ubi supra*. Doe d. Hebblethwaite v.

Roe, cited 3 T. R. 783. n.

(e) Underhill v. Durham, 1 Salk. 256.

(f) General rule, K. B. 4 B. and A. 196.

(g) General rule, 2 Brod. and B. 470.

This done, and the declaration having been altered by inserting the name of the new defendant, in ordinary cases the cause goes down to trial on the question of title only. But, as between landlord and tenant, the question of title also cannot arise unless the tenant has given up the possession, which he received from the lessor of the plaintiff, although the lease or agreement under which he entered has expired. If he has done so, and claims under some other landlord, such other landlord must be joined as defendant with him; for the court, it is said, will not endure that a lessee should defend an ejectment alone against a landlord or those claiming under him on a supposed defect of title. (*h*)

The landlord cannot make himself a party till the tenant has appeared, for he is only to defend the possession with him. Therefore, where (*i*) the landlord gave an attorney an authority to appear for several tenants, without their privity, the judgment was set aside.

In Lord Holt's time the notice in ejectment was usually to appear of the next term after the declaration was delivered: but where (*k*) the declaration was delivered before the essoign day of the term, and notice was given to the defendant to appear of the same term, the court said as the notice was often so given, they would allow a motion that the defendant might plead the next term.

By a recent general rule adopted both by the court of C. B. (*l*) and K. B., (*m*) it is ordered that "in all country ejectments which shall be served before the essoign day of Michaelmas or Easter Term, the time for appearance of the tenant in possession shall be within (four) days after the end of such term, and shall not be postponed to four days after Hilary or Trinity Term next respectively following."

If the tenant in possession neglect to appear, the plaintiff may move for judgment against the casual ejectors upon affidavit of service, which in town causes must be moved for in the same

(*h*) *Driver v. Oxendon v. Lawrence*, 9 M. 1530. *Doe v. Troughton v. Roe*, 4 Burr. 1998. *Doe v. Knight v. Smythe*, 4 M. and S. 347.

(*i*) *Doe v. Hunt*, 1 Barnard. 386.

(*k*) *Wyatt v. Winkworth*, 1 Barnard. 161.

(*l*) General rule, C. B. 2 Brod. and B. 705.

(*m*) General rule, K. B. 4 B. and A. 339.

term the declaration was served. But in country cases the notice to the tenant in possession may be to appear in the next issuable term, and judgment against the casual ejector may be moved for in that term. (n) Where the declaration has been served on the party, it must appear by the affidavit of service that he is the tenant in possession; therefore an affidavit of service on the person in possession, (o) or who appeared to be in possession, (p) or upon a person whom the defendant believes to be the tenant in possession, is insufficient. (q) It is however sufficient, if the affidavit state the declaration to have been served on the wife upon the premises, although it be not expressly stated that the husband is tenant in possession, provided that fact can be collected from necessary inference. (r) But an affidavit of service on the premises on a woman who represented herself to be the wife of the tenant in possession, without adding that the defendant believed her to be so, is insufficient. (s) Where it appeared from affidavit that the tenant resided abroad, and carried on business by an agent on the premises, service by delivery to the agent, and also affixing the declaration on the premises, was held sufficient. (t)

If the court are satisfied that the tenant has had notice of the declaration, they will make the rule absolute for judgment against the casual ejector in the first instance; otherwise, they will have only a rule to shew cause why the service should not be deemed under the circumstances good service; and it is usual to direct that service of the rule on the premises shall be deemed sufficient. (w) If the affidavit of service of a declaration in ejectment be defective, the court will give leave to file a supplemental affidavit. (x) But a rule for judgment in the King's Bench cannot be drawn up conditionally, provided a supplemental affidavit is produced; (y) although in the Common Pleas it seems to be otherwise. (z)

Where (a) there are several tenants, only one rule is necessary

(n) *Doe d. Clarke v. Roe*, 4 Taunt. 738.

(o) *Doe d. Robinson v. Roe*, T. 35 Geo. III. K. B. 1 Tidd. Pr. 507.

(p) 1 Chitt. Rep. 574.

(q) *Ib.* 515. 505.

(r) 1 Chitt. 500. *in notes*.

(s) 1 Chit. Rep. 228.

(t) *Doe v. Roe*, 4 B. and A. 633.

(u) *Douglas v. ———*, 1 Str. 571.

Sprightly and Collins v. Dench, 3 Burr. 1116. *Goodright d. Methold v. No-right*, 1 Bl. 290.

(x) *Doe d. Robinson v. Roe*, T. 35 Geo. III. 1 Tidd. Pr. 507.

(y) 1 Chitt. 499.

(z) *Jenny d. Preston v. Cutts*, 1 N. R. 308.

(a) *Doe d. Burlton v. Roe*, 7 T. R.

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on a motion for judgment against the casual ejector, though the name of each tenant was prefixed on the notice served on him individually.

The clerk of the rules in the K.B., and secondaries in the C. P., are required to keep a book for entering rules in ejectment, containing a list of the ejectments moved, the number of the entry, the county, and the names of the parties; and unless the rule for judgment be drawn up and taken away from the office of the clerk of the rules or secondaries, within two days after the end of the term in which the ejectment shall be moved, no rule can be drawn up or entered in the book, nor can any proceedings be had in such ejectment. (b) In the Exchequer it is a rule that in all country ejectments, which are moved in a term not issuable, the defendant shall have four days next after the end of the next issuable term immediately succeeding to appear thereto. (c)

After judgment against the casual ejector the court on the motion of the landlord to set aside the judgment, on the ground that the tenant had not given him notice of the ejectment, made the following rule, that the judgment and *habere facias possessionem* should be set aside, and the tenant should pay the costs, and make the landlord, defendant, &c. (d) So the court will set aside an *habere facias possessionem* on a suggestion of collusion, and let in a landlord to try the ejectment. (e)

On a proceeding by original in ejectment where the common rule was entered into at a judge's chambers; it was held not requisite to enter an appearance for the defendant: and in this respect the practice of the K. B. was said to differ from that of the C. P. where in ejectments by original the appearance must always be entered with the filacer. In proceedings by bill in K. B. it is not necessary. (f)

After the tenant has entered into the rule, he cannot give judgment to the plaintiff by *cognovit actionem*, but he must enter a *relicta verificatione*: a judgment therefore obtained by a *cognovit actionem* may be set aside. (g)

The landlord may make himself a co-defendant at any time

(b) 1 Tidd Pr. 507.

Roe, 5 Taunt. 205.

(c) *Ibid.*

(f) Short v. King, 2 Barnard. 224.

(d) Doe d. Troughton v. Roe, 4 Burr. 1996.

(g) Doe d. Locke v. Franklin, 7 Taunt. 9.

(e) Doe d. Grocers' Company v.

after the tenant has entered into the rule ; and that, though he did not actually make the lease to the tenant, so as he shews by reasonable evidence to the court that he is the person entitled to do so as landlord. (*h*)

Where the lessor of the plaintiff is unknown to the defendant, the latter may call for an account of his residence or place of abode from the opposite attorney ; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court will stay the proceedings till security is given for costs. So where the lessor is an infant, or resident abroad, or dead, the court will stay proceedings until a substantial plaintiff be named, or some responsible person undertake for the payment of costs. A similar undertaking is required in an action for mesne profits. (*i*)

The lessor of the plaintiff having privilege is not therefore obliged to make a real plaintiff, or to give security for costs. (*k*) But an infant lessor must prevail on some person to be security for costs, who is usually his *prochein amy*. (*l*) When (*m*) the lessor of the plaintiff is abroad, he must give security for costs. A different practice prevails in C. P., unless the lessor go abroad to avoid his creditors. (*n*)

The action of ejectment is local ; and therefore the venue on the declaration must be where the lands lie. With respect to the demise, it may be observed that coparceners may join in ejectment as well as joint tenants : (*o*) but tenants in common must make several demises. (*p*)

Formerly it was said that the lessee of a corporation aggregate should declare on a demise by deed, because an actual lease must be sealed on the premises : but the rule is now different, and the plaintiff in such a case may declare in the common form. (*q*)

Although ejectment be merely a fictitious action, yet the courts adhere so far to form that the demise in the declaration cannot be laid on a day before the title of the lessor of plaintiff could

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| (<i>h</i>) Wildish v. Lunden, 2 Barnard. | 491. |
| 149. | (<i>n</i>) 1 T. R. 267. |
| (<i>i</i>) Tidd Pr. 551. | (<i>o</i>) Boner v. Juner, 1 Ld. Raym. |
| (<i>k</i>) Preston v. Lingen, 1 Str. 479. | 726. |
| (<i>l</i>) Anon. 1 Wils. 130. Buckman v. | (<i>p</i>) See Comb. 213. |
| Noright, Cat. temp. Hardw. 56. | (<i>q</i>) Runn. Ej. 149. Partridge v. |
| (<i>m</i>) Doe d. Selby v. Alston, 1 T. R. | Ball, 1 Ld. Raym. 136. |

have accrued. But where (r) the demise of an heir by descent was laid on the day his ancestor died, it was held well enough after verdict; for although a verdict will not cure a defective title, it will cure a defect in setting out a good title.

So it is good ground of error in ejectment by original, if the action be brought before the day of the demise to the plaintiff. Where (s) for instance the demise was on the essoign or first day of Hilary term, and the declaration was of the same day, Holt C. J. said, if the plaintiff in error wished to take advantage of it, he should allege diminution, and procure the original writ to be certified; and if that was found to be returnable before the title of the plaintiff accrued, it would be error. But if the declaration be general of Michaelmas term, and the demise is laid on the essoign day this is consistent; for a man may sue an original teste in full term, and Michaelmas term being a long term, it may be returnable before the end of it. This shall be intended after verdict, and advantage should have been taken of it upon oyer of the original. (t)

The declaration should in general describe the premises with sufficient accuracy: but it is not necessary to aver that the premises are in a parish. If they are described as being in the parish of A. and B., the word "parish" is surplage; and the court will construe it to be part in the parish of A., and part in B., B. being the name of a parish. (u) Where (x) however ejectment was brought for a house in the parish of St. Peter in the ward of Cheap, and the defendant proved that the house was in the ward of Farringdon-within, and that no part of the parish of St. Peter was in the ward of Cheap, the plaintiff was nonsuited. So an ejectment of land in the parishes of A. and B., or one of them, is bad for an uncertainty: neither is it cured by verdict. (y)

The same certainty is not required in an ejectment *as in a præcipe*; ejectment, therefore, will lie of part of a house. (z) So it will lie for a place called the passage-room, (a) or for a place called

(r) *Roe d. Wrangham v. Hersey*, 3 Walter, 4 Taunt. 671.

Wils. 274. *Small d. Baker v. Cole*, 2 (s) *Boddy v. Smith*, 1 Str. 595.

Burr. 1161.

(y) *Goodright d. Griffin v. Fawson*,

(t) *Cook v. Darbison*, Carth. 282. 7 Mod. 457.

(u) *Rogers v. Baresby*, 2 Ld. Raym. 270.

(z) *Sullivan v. Seagrave*, 1 Str. 695.

(a) *Bindover v. Sindercombe*, 2 Ld.

(u) *Goodtitle d. Brambridge v. Raym.* 1470.

the vestry. (b) So ejectment of coal-mines, without saying how many, on a view of the precedents in the county of Durham, was held good: (c) but ejectment of five closes of land arable and pasture is bad, without distinguishing how many are arable, and how many pasture. (d) Although it has often been said that the description should be so certain that the sheriff may be able to know the parcels, yet in fact he delivers possession on the shewing of the plaintiff: and it is at the peril of the plaintiff to take possession of no more than he is entitled to. (e)

It is not necessary that the counts in the declaration should so correspond with the notice to quit as to make it necessary, where there are several lessors who have signed the notice, that there should be a joint demise from all. The notice must be signed by all the persons entitled; and it makes no difference how the counts distribute the interest. (f)

It has been held a good objection to a declaration in ejectment, declaring "for a messuage and tenement," and that in arrest of judgment; (g) although in Ireland a declaration for messuages, lands, &c., with the town and tenement of B., has been held good. (h) So in Ireland ejectments have been brought of "mountain bog," or of a "mountain in a bog;" and a certificate has been given by the judges in Ireland that "mountain" described quality, and not merely situation. Ejectment lies for a beastgate, which is a term known in Suffolk, and imports land and common for one beast. (i) Cattlegate may either mean pasture land, or it may mean common appurtenant. (k)

Ejectment may be brought for an orchard, which may also be demanded in a *præcipe*, either by that name, or by the name of a garden. (l) So it lies for a stable and a cottage. (m) But "a close"

(b) *Hutchinson v. Puller*, 84 Ch. II. B. R. cited *G*.

(c) *Andrews v. Whittingham*, Carth. 277.

(d) *Knight v. Syme*, Carth. 204. *Martin v. Nichols*, Cro. Car. 272. See *Connor v. West*, 5 Burr. 2673.

(e) *Connor v. West*, 5 Burr. 2673.

(f) *Doe d. Jelliffe v. Sybourn*, 2 Esp. N. P. C. 617.

(g) *Doe d. Bradshaw v. Flewman*,

1 East. 441. *Doe d. Stuart v. Denton*, 1 T. R. 11. *contra*.

(h) *Cottingham v. King*, 1 Burr. 625.

(i) *Bennington v. Goodtitle*, 2 Str. 1084.

(k) *Metcalf v. Roe*, Cas. temp. Hardw. 167.

(l) *Wright & Wheatley*, Cro. Eliz. 254. *Royston v. Eccleston*, Cro. Jac. 654.

(m) *Russell*, 123.

seems an insufficient description, as well as "a piece of land :"(n) but a declaration "for a close containing three acres of arable land" has been held to be sufficiently certain. (o) "A messuage or tenement" is too uncertain, even after verdict. (p)

In ejectment for the forfeiture of a lease the court will compel the plaintiff to deliver a particular of the breaches of covenant on which he intends to rely. (q) And the court before trial will stay proceedings on an ejectment for nonpayment of rent, on the payment of the rent: but the stat. 4 Geo. II. c. 28. only warrants application of this sort before trial. (r) Where, (s) however, the plaintiff was both executor and devisee, and he brought ejectment for rent, part of which was due to him as devisee in his own time, and part he claimed as executor, it was held he could not join both in the same declaration.

After entering into the common rule the defendant can plead nothing but the general issue without leave; therefore if the lands lie in a county palatine, or in ancient demesne, the party must apply by motion for leave to plead to the jurisdiction on affidavit that such is the case. (t)

In ejectment it is never necessary to join issue before a motion for a trial at bar, although in all other cases it is. (u) And it is no objection to such a motion, that the defendants severally hold but small parcels, by different titles: if the lessor of the plaintiff makes but one title, he may join them in one action; and the court will grant a trial at bar on the common affidavit of value. (v)

If the defendant, after entering into the rule, does not appear, (x) the plaintiff must be nonsuited: but he will have judgment on the rule. (y) But if he be nonsuited at the trial for want of the defendant's confessing lease, entry, and ouster, he is not entitled to sign judgment against the casual ejector till the postea comes in on the day in bank. Where, (z) however, no reason appeared

(n) Knight v. Syme, 1 Salk. 254.

7 Mod. 457.

(o) Wykes v. Sparrow, Cro. Jac. 435.

(t) Jones v. Doe, 2 Barnard. 126. Thrustout v. Holdfast, 1 Barnard. 365.

(p) Goodright d. Welch v. Flood, 3 Wils. 23.

(u) Goodright v. Hart, 1 Barnard. 128.

(q) Doe d. Birch v. Phillips, 6 T. R. 597.

(v) Preston v. Lingen, 1 Str. 479.

(x) See ante, p. 780.

(r) Roe d. West v. Davis, 7 East. 363.

(y) Hawey v. Mountney, Styl. 425.

(z) Doe d. Lord Palmerston v.

(s) Duckworth d. Tably v. Tunstall,

Copeland, 2 T. R. 777.

on the merits why the lessor of the plaintiff would not be entitled ultimately to recover, it was agreed that he should remain in possession; and it was referred to the master to settle what damages the defendant had sustained by the premature issuing of the writ of possession.

Where (a) there was an ejectment against several, and some confessed lease, entry, and ouster, and others did not, a rule was made that the plaintiff might proceed against those who confessed, and be nonsuited as to the rest: but that the cause of nonsuit should be expressed on the record in order that they might not have costs against the plaintiff: and on the return of the *postea*, the court being informed what lands were in the possession of the defendants refusing, judgment might be entered against the casual ejector as to them.

By stat. 1 Geo. IV. c. 87. s. 2. it is enacted that wherever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant, or his attorney, has been served with due notice of trial, the plaintiff shall not be nonsuited for default of defendant's appearance, or of confession of lease, entry, and ouster: but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster.

Pleas in bar or abatement are now seldom, if ever, pleaded in this action; for, according to the modern practice, the defendant, if he appear, is generally bound by the consent rule to plead the general issue of not guilty. This plea, accordingly, is usually left with the consent rule at the judge's chambers, or the prothonotary's. The present practice of delivering the declaration to the casual ejector before the term forces the defendant to issue the same term.

A new defendant in ejectment may give a rule to reply and *nonpros* the plaintiff; but can have no costs, the plaintiff being nominal. (b) In the case cited the landlord had applied to be made defendant, and had entered into the common rule: but the lessor of the plaintiff had never entered into the consent rule; and, therefore, it was contended he could not be forced to proceed

(a) *Greeves v. Rolls*, 2 Salk. 457. (b) *Goodright d. Ward v. Badtittle*,
Claxmore v. Scarle, 1 Lord Raym. 2 Bl. Rep. 763.

against a person whom he had never accepted as defendant. But the court held the rule regular notwithstanding.

Where (c) a defendant shews by affidavit that he is a coparcener, joint-tenant, or tenant in common with the lessor of the plaintiff, and denies actual ouster, the court will permit him to confess lease and entry without confessing ouster. In such cases ouster must be proved by shewing that the defendant held adversely, or that he denied the title of the other co-tenants or claimed the whole premises for himself, or denied possession to the others, or took the whole of the profits, and refused to account ; or had the sole and undisturbed possession, without payment of rent, and without claim of any part by the other co-tenants during the whole of that time. (d)

Twenty years' adverse possession is a good title in ejectment, both for the lessor of the plaintiff and the defendant. (e) But the declarations of a widow in possession that she held them for her life only have been held admissible to negative the fact of adverse possession. (f) And similar declarations of either party in other cases would clearly be admissible in evidence for the same purpose.

The right of entry may, however, be pursued within twenty years after it attaches, although in the mean time the party may have had a different right upon which more than twenty years' adverse possession has attached. Thus, when tenant in tail of lands in ancient demesne demised them by fine in the court of ancient demesne for three lives, and afterwards levied a fine of the reversion in the same court to the use of himself and his heirs, it being agreed that the fines in that case did not bar an estate tail, it was held that the first fine created a discontinuance, and the second not ; and that although the issue in tail did not bring a formedon within twenty years after the death of their ancestor, they were not barred of their right of entry within twenty years from the determination of the lease for lives. (g) So where (h)

(c) *Doe d. Gigner v. Roe*, 2 Taunt. 397.

(d) *Doe d. Fisher v. Prosser*, Cowp. 217. *Doe d. Hellings v. Bird*, 11 East. 49.

(e) *Stoke v. Barry*, Cas. temp. Holt 264. St. 21 Jam. I. c. 16.

(f) *Doe d. Human v. Pettett*, 5 B. and A. 223.

(g) *Hunt v. Bourne*, 1 Salk. 339. 2 Salk. 423.

(h) *Doe d. Cook v. Danvers*, 7 East. 299.

a devisor of an estate leased for years with condition of re-entry for nonpayment of rent, and after his death his heir received the rent for more than twenty years during the term, without any steps being taken by the devisee to recover possession: it was held the devisee was not barred, for that he could not have entered during the lease; and, although a forfeiture had been committed, he was not obliged to enter.

Ecclesiastical persons are not in general barred by the statutes of limitations. (i) Where an ecclesiastical person neglects to bring his action within the time required, he himself will be barred, but not his successor. (k)

By the second section of the statute 21 Jam. I. c. 16. any person labouring under the disability of infancy, coverture, or insanity, or being abroad, may, notwithstanding the expiration of such twenty years, bring his action, or make his entry within ten years after the removal of his disability; but if the statute once attaches it continues to run notwithstanding any subsequent disability. (l) And the same law is of a fine and nonclaim. (m)

The circumstances of the following case (n) may be stated thus:—there was a demise of land to the rector of D. for forty years, at a certain rent; and in the lease the rector, after covenanting for payment, further granted to the lessor the tithes of oats in his parish; and the lease contained a condition of re-entry, if the rent should be in arrear, or the lessor, his heirs and assigns, should be disturbed in the receipt of the tithes, concluding with a covenant for quiet enjoyment on the part of the lessor. After the expiration of the lease, the rector having continued to hold the land without paying rent, the lessor in the mean while taking the tithes of oats, and some confusion existing between the rector and the heirs of the other party as to their respective rights to tithes of which they were portionists, the possession by the rector of the land, was held not to be adverse so as to let in the statute of limitations.

In general the assignee of a lease, if he be the lessor of the

(i) *Magdalen Coll. Case*, 11 Rep. 300.

66.

(m) See *Evans's Stat. Pt. II. Cl. X.*

(k) *Plow. 358. Evans's Stat. Pt. IV.*

No. 7. n. 2.

Cl. VIII. No. 4. Vol. 3.

(n) *Roe d. Pellatt, v. Robson*, 2 B.

(i) *Doe d. Durore v. Jones*, 4 T. B. and P. 543.

plaintiff, must prove all mesne assignments : but where, (o) in the case of a long term, the lessor of the plaintiff proved possession for seventy years' the mesne assignments were presumed. And the assignment to the plaintiff's lessor is good evidence without producing the original lease. (p) The vendee from the sheriff under a *fi. fa.* must prove the judgment as well as the writ. (q)

As between landlord and tenant a submission to a distress for rent stated in the notice to be due from the defendant as tenant is an acknowledgment of a tenancy, and therefore is sufficient evidence of title. (r) So payment of rent to the lessor, or to any for his use, is sufficient where the defendant has no title but possession. (s) And proof of payment to the assignee of the reversion is sufficient evidence of the assignment. (t)

But it has been held that ejectment cannot be maintained against the bailiffs *pro tempore* of a corporation in their character of bailiffs, by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of rent in succession was said to be only evidence of a tenancy in the corporation. It was, however, admitted that such a tenancy might be determined by notice to quit served on the officers of the corporation; after which the owner might maintain ejectment against any person in the actual possession of the premises. (u)

A defendant who has paid rent may shew that the lessor of the plaintiff pending the term sold the premises, or that his title expired in some other way : but in that case it must appear that the tenant has not paid any rent after such expiration of title. (x) But that the tenant shall not be permitted to set up any objection to the title of the landlord under whom he has held is not a mere technical rule. It is founded on public convenience and policy. Neither is it any hardship upon third persons; for the fair and convenient mode of trying the title is by action against the tenant,

(o) *Earl d. Goodwin v. Baxter*, 2 Bl. 1228.

(p) *Astley v. Child*, Comb. 340.

(q) *Doe d. Bland v. Smith*, 2 Stark.

N. P. C. 199.

(r) *Panton v. Jones*, 3 Campb. N. P. C. 372.

(s) *Anon.* 2 Show. 126.

(t) *Crosby v. Percy*, 1 Campb. 303.

(u) *Doe d. Lord Carlisle v. Woodman*, 8 East. 228.

(x) *England d. Syburn v. Slade*, 4 T. R. 682. *Doe d. Jackson v. Rumbottom*, 3 M. and S. 516.

in which case the landlord has full opportunity to make a defence. In the case of *Driver d. Oxenden v. Lawrence*,^(y) therefore, where it appeared that the defendant's father had paid rent to a landlord under whose will the lessor of the plaintiff claimed; and the defendant also, who succeeded the father, had paid rent accruing in the lifetime of that landlord, but after his death refused to pay any subsequent rents, by the direction of a third person who claimed the estate, respecting whose title some evidence was given at the trial of the action; the court of Common Pleas, on a question reserved as to the right of the lessor of the plaintiff to recover, expressed some surprise at the manner in which the title had been disputed, and said they would not endure that the defendant who was the lessee of the devisee (the lessor of the plaintiff,) or claimed under him, should defend an ejectment against his own landlord on a supposed defect of title. So if B., claiming lands under A., let lands to C. for a year, and dies, in an ejectment by A. against C., C. cannot dispute A.'s title. (z)

If the lease is a joint lease from several persons, it has been said that they must be proved to be joint tenants: but it seems to be only necessary to prove that they had such an interest as would enable them to demise jointly the premises in question. (a)

In Mr. Phillipps's 2nd vol. on Evidence the following observations occur in a note: "The plaintiff may declare on the several demises of each of several joint-tenants, as well as on the joint demise of all; for by the several demises of each of the parties interested he has the entire interest in the whole subject matter, and the several letting severs the joint-tenancy, *Doe d. Marsack v. Read*, 12 East. 57. *Doe d. Whayman v. Chaplin*, 3 Taunt. 120. After the decision in the former of these cases it may be a question (as was suggested in that case by the Attorney-general, Sir V. Gibbs,) whether, since joint-tenants may sever, tenants in common may not join. The books lay it down as a clear established rule of law that tenants in common may join in a lease for years, although such a lease will in point of legal operation enure as several leases. (b) However, there are many authorities to shew that tenants

(y) 2 Blackst. 1259.

(z) *Barwick d. Corporation of Richmond v. Thomson*, 7 T. R. 488.

(a) 2 Phill. Ev. 170.

(b) Co. Litt. 200. a. *Mantle v. Wollington*, Cro. Jac. 166. *Moor v. Fursden*, 1 Show. 342. *Heatherley d. Worthington v. Weston*, 2 Wils. 232.

in common cannot join in a demise in an action of ejectment." (c) On these remarks it should be observed in the first place, that the suggestion of Sir Vicary Gibbs appears to be inconsequential; because, although from the nature of joint-tenancy several lettings will sever the jointure, a joint letting by tenants in common will not create a jointure, but the reversion will still remain several. In the next place the doctrine in the books does not relate so much to the power of tenants in common to join in one indenture, as to shew that the effect of such a lease is several, although in appearance the deed is joint. With respect to the cases cited, it appears that the question made in them was purely a question of pleading. And there seems to be no reason why a *bond fide* tenant claiming under one indenture made by several tenants in common may not bring ejectment on such a demise, stating such indenture according to its real effect, as several demises, although apparently it is the joint demise of all.

An action of ejectment has been held to be maintainable by one of two tenants in common, who had agreed to divide their property, if after such agreement the defendant who held under both as occupier paid rent under a distress to such co-tenant alone; and it is no defence to such action that the deeds of partition between the co-tenants had not been executed. In this case Burrough, J. stated that the defendant had admitted the lessor of the plaintiff to be the sole owner, by making a treaty for some timber with him alone, subsequent to receiving a notice to quit from him. (d)

Where (e) A. had demised premises to B. for one year, and it was agreed that after that year the tenancy should expire on three months' notice being given by A., and B. entered and took receipts for rent, first from A. in A.'s own name, and afterwards in the names of A. and two others, who were his partners; and after three years' possession, he received notice to quit from A. alone: it was held that A. might recover on his own demise in an action of ejectment, the notice to quit from him alone being sufficient to determine the tenancy. Gibbs, C. J. observed that the circumstances of the receipts of rent for a certain period having been

(c) 2 Phill. Ev. 170, note.

Mitchell, 1 Brod. and B. 11, S. C.

(d) Doe d. Pitcher v. Mitchell, 3 B. Moor. 239. Doe d. Pritchett v.

(e) Doe d. Green v. Baker, 8 Taunt.

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given by the partners did not prove the legal estate to have been in them.

After the landlord has proved payment of rent by the defendant, and half a year's notice to quit, he cannot be turned round by his witness proving on cross-examination that an agreement relative to the land in question was produced at a former trial between the same parties, and was in the morning of the trial seen in the hands of the plaintiff's attorney. The contents of the agreement the witness did not know; no notice was given by the defendant to produce it; neither did it appear to relate to the matter in question, nor even to be made between the same parties. (f)

In ejectment brought upon the joint demise of several trustees of a charity it was held not to be sufficient for the defendant, who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times as evidence that they were tenants in common; for, as against the defendant his payment of the entire rent to the common agent of the trustees, at all events, was sufficient to support a joint demise, without making them shew their title more precisely. (g) So the plaintiff in ejectment, under the several demises of two, may, after notice to quit, recover the possession from tenant from year to year, on evidence that the common agent of the two had received from the tenant the rent which was stated in the receipts to be due to the two lessors: for, although a joint tenancy should be presumed from such receipts, and a several demise severs it; yet, as the plaintiff had the whole interest in him, no objection could arise on that head. (h) In ejectment on the several demises of three, each demise being of the whole, the lessors may recover on evidence that they jointly granted a lease to the defendant which has expired. (i)

If the lessor of the plaintiff, after issue and before trial, enter into part of the premises, the fact may be pleaded at the assizes as a plea *puis darrein continuance*. The judge at *nisi prius* is bound to receive it; and the trial, therefore, will be thereby suspended; for the plaintiff cannot reply to it during the assizes. (k)

(f) *Doe d. Wood v. Morris*, 12 East. 57.

East. 237.

(g) *Doe d. Lulham v. Fenn*, 3

(g) *Doe d. Clarke v. Grant*, 12 Campb. N.P.C. 190.

East. 231.

(k) 2 Sellon's Pr. 192. *Lovell v.*

(h) *Doe d. Marsack v. Read*, 12 Eastaff, 3 T. R. 554.

Receipts for rent are not sufficient evidence of title in the lessor unless he proves actual payment, especially where the person who has signed the receipt is living. Where, however, there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of payment; because no other can be had. (m)

Where (n) a fine was levied of Michaelmas Term relating to the sixth, though in fact levied the eighth of November, it was held sufficient evidence of the seisin in fact of the conusor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed in his behalf on the evening of the sixth by the officer's entry on the land, and claiming it for the conusor; but without any actual change of the tenant in possession, who afterwards paid the rent to the conusor. So it seems that the receipt by the lawful possessor of rent due after the fine levied for a period antecedent to such fine is *prima facie* evidence, if no covin appears, of his possession during the period for which the rent is received.

Although entry is necessary to avoid a fine; yet if the plaintiff's lessor make an entry, and afterwards the defendant levies a fine, and then an ejectment is brought, the demise laid before the fine is good, because *partes finis nihil habuerunt*. (o) So where (p) lessee *pur auter vie* continued in possession after the death of *cestui que vie* without paying rent, and after his death his son in the same manner continued the possession, and then levied a fine, by this fine *nil operatur*; for in order to constitute a disseisor there must be a wrongful entry, and to toll entry by descent cast there must be a descendible estate. It was held therefore that the son, notwithstanding the fine, might be ejected without notice or entry to avoid the fine. (q)

The court cannot stay proceedings, though the lessor's title expire before trial; for, although the plaintiff cannot recover the possession, yet the damages and costs may be recovered. All that the court can do is to make the plaintiff give security for costs, as in the case of infants. (r)

(m) *Manning v. Lechmere*, 1 Atk. 453.

(n) *Doe d. Osborne v. Spencer*, 11 East. 495.

(o) *Musgrave d. Hilton v. Shelley*, 1 Wils. 214.

(p) *Doe d. Byrrell v. Perkins*, 3 M. and S. 271.

(q) See *Rowe v. Power*, 2 N.B. 1. and 1 East. 575.

(r) *Thrustout d. Turner v. Gray*, 2 Str. 1056.

It does not appear that the court of Exchequer, or any courts of record except the courts of K. B. and C. P., have adopted the general regulation above mentioned (s) respecting the admission of possession in the consent rule. In issues therefore proceeding out of such courts the lessor of the plaintiff must prove at the trial the defendant (*or if the landlord defend, "the tenant"*) in possession of the specific premises he seeks to recover. (t)

A tenant in possession is not a good witness to support his landlord's title, because it is to uphold his own possession. (u) Neither can the lessor prove his lessee's title. (x) But where the defendant comes in as landlord, it is sufficient to connect him with the premises to which the lessor of the plaintiff makes title, to shew that the declaration in ejectment was served upon the tenant in possession. (y) And in ejectment between two persons, both claiming under demises under the same landlord, it was held that the landlord who had become a bankrupt was a competent witness to prove that the premises in dispute were included in the first lease. (z)

In an ejectment (a) where the plaintiff proved a *prima facie* possession in the defendant, the latter to whom in fact the land had been demised, but who had shifted over the land to his son, called him to prove that he the son was really the tenant in possession, and that the defendant was only a bailiff and manager for him. Dampier, J. rejected the witness. On a motion for a new trial, Serjeant Best contended that this case differed from those in which it had been held that the tenant in possession was an incompetent witness in an ejectment against his landlord; (b) for in this case the effect of the evidence would be to subject the witness both to an ejectment and an action for mesne profits, and this was contrary to his interest. Mansfield, C. J. "He comes to rebut a verdict which would have the effect of turning him out

(s) *Ante.*

(t) *Goodright d. Balch v. Rich*, 7 T. R. 327. *Fenn d. Blanchard v. Wood*, 1 B. and P. 573. *Goodright v. Hart*, 2 Str. 830.

(u) *Doe d. Foster v. Williams*, Cowp. 621. *Bourne v. Turner*, 1 Str. 632. *Doe d. Winchley v. Pye*, 1 Esp. N.P.C. 364.

(x) *Smith v. Chambers*, 4 Esp. N.P.C.

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(y) *Doe d. Scholefield v. Alexander*, 3 Campb. N.P.C. 516. *Fenn d. Phillips v. Cooke*, *ib.* 512.

(z) *Longchamp d. Evitts v. Fawcett*, Peake N.P.C. 71.

(a) *Doe d. Jones v. Wilde*, 5 Taunt. 183. *Doe d. Lewis v. Bingham*, 4 B. and A. 672.

(b) To support his landlord's title.

immediately; and that is an immediate interest, and outweighs the contrary and remoter effect of his subjecting himself by his testimony to an action."

The plaintiff is entitled to recover an ejectment, although the defendant appear to be the mere servant of another by whose permission he entered, (c) for in that case the defendant is a mere trespasser. And, in ejectment brought by an executor, it is *prima facie* evidence of the testator's title, to put in the defendant's answer to a bill in equity, in which he has stated his belief that the testator was entitled to the possession. (d)

The counterpart of a lease granted by a mortgagor, in conjunction with the mortgagee of certain premises, cannot be given in evidence against one who derives title under the mortgagee, without some evidence of the original lease by the mortgagor. But proof that the original lease was signed by the mortgagee, the subscribing witness not being known, would be sufficient to admit the counterpart. (e)

In ejectment upon a clause of re-entry for non-payment of rent against the assignee of a lease, proof of the counterpart by the subscribing witness is sufficient evidence of the holding on the condition: (f) but, in an ejectment for assigning without licence, it is not sufficient evidence of a breach of a condition not to assign without licence to prove a stranger in possession, and his declaration that the premises were demised to him by another stranger. (g)

Where there was in a lease a condition that the lessee should not do a particular act without notice in writing, and after the assignment of the reversion the assignee brought ejectment for breach of the condition; it was held sufficient for the lessee to give such assignee notice to produce the original notice in writing of his intention to do the act complained of; for it would be presumed to have been delivered up to the assignee of the reversion as a document relating to the estate: and on default of its production the defendant may give parol evidence of it.

(c) *Dec d. Cuff v. Stradling*, 2 Stark. N.P.C. 187.

(f) *Dec d. West v. Davis*, 7 East. 363.

(d) *Dec d. Digby v. Steel*, 3 Campb. 115.

(g) *Dec d. Payne*, 1 Stark. 66.

(h) *Goodtitle d. Luzmore v. Seville*,

(e) *Dec d. Clark v. Trapaud*, 1 Stark. N.P.C. 261.

16 East. 67.

In an ejectment on the assignment of a lease to secure an annuity a memorial will be presumed, till the contrary is proved. (*i*)

Entries of charges made by an attorney in his books, shewing the time when a certain lease prepared for his client was executed, (which charges were shewn to have been paid,) have been admitted in evidence to shew that a lease, executed under a power to lease in possession, and not in reversion, was not in fact executed till after the time limited for its commencement, which according to the nominal date was future and reversionary. (*k*)

In ejectment the person having the legal title must prevail; and therefore a plaintiff claiming under an elegit, subsequent to a lease granted, cannot recover, although he give notice to the tenant that he does not intend to disturb his possession, but only wishes to get into the receipt of the profits. (*l*) But courts of equity will interfere to remove any temporary obstacle, which there may be to the trial of the legal right at law; therefore, where (*m*) a tenant acquiesced in ignorance of his rights for seventeen years after an eviction for non-payment of rent, and then brought a bill praying for liberty to try the validity of the eviction at law, by the removal of a temporary bar, *vis.* a mortgage of the tenant's interest vested in the landlord, it was held that he was entitled to such relief, the defendant having by concealment of a fact obtained an advantage inconsistent with good conscience. So, where (*n*) the bill stated, that the plaintiff being seised in fee, on the twenty-eighth of Jan. 1800, demised to A. for seven years, under which demise he entered and paid rent; and in Michaelmas 1804, an ejectment was brought, in which the plaintiff and A. became defendants and entered into the usual rule, and the plaintiff by his own negligence had a verdict against him; after which A. attorned to the lessor of the plaintiff. The plaintiff, intending to try his title again, was held clearly to have an equity to restrain A. from setting up against him his own lease. Neither is it necessary in such cases that the ejectment should be brought at the time of the bill filed.

(*i*) Doe d. Griffin v. Mason, 3 T. R. 2. Roe d. Reade v. Reade, 8 Campb. N. P. C. 7. T. R. 122.

(*k*) Doe d. Reace v. Robson, 15 East. 32. (*m*) Blenner v. Day, 2 Ball. and Beatt. 104.

(*l*) Doe d. Da Costa v. Wharton, 8 (*n*) Baker v. Mellish, 10 Ves. 544.

Since the legal title must prevail, it also follows that the lessor of the plaintiff cannot recover, if there be a term outstanding in a trustee, or if a satisfied term be set up by a mortgagor against a mortgagee: but in some cases the court will direct a jury to presume a surrender. Upon this point much difference of opinion exists between the courts of law and equity. The whole system of assigning satisfied mortgage terms to attend the inheritance having been resorted to by conveyancers upon the faith of its being an established principle at law that such terms were available as a defence at law in actions of ejectment, courts of equity have so far countenanced the practice of conveyancers as to permit them to be a protection to *bond fide* purchasers for valuable consideration without notice, against all estates, charges, and incumbrances created intermediately between the term and the purchase. A term, therefore, ought not to be presumed to be surrendered because it is satisfied: but there ought to be some dealing about it; or there is taken from a purchaser the effect of his diligence, in having got the legal estate, to the benefit of which he is entitled. (o) The court of K. B., however, has in two late instances, (p) countenanced a somewhat different doctrine. The principle advanced in the first of these cases was, that the court would direct the jury to presume a surrender, where it is for the interest of the owner of the inheritance that the term should be considered surrendered; and where an estate had continued for a long period in the same hands, it was thought there was no beneficial purpose which could be answered by a continuance of the term. In the second of these cases Abbott, C. J., in delivering the judgment of the court, observed, that where a term of years becomes attendant upon the inheritance, the enjoyment of the land by the owner of the inheritance as *cestui que trust*, though for a long time, might afford no presumption of a surrender: but where acts have been done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not to be reasonably done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a

(o) *Evans v. Bicknell*, 6 Ves. 184. & A. 710. *Doe d. Putland v. Hildon*,
Hillary v. Waller, 12 Ves. 239. *ib.* 782.

(p) *Doe d. Burdett v. Wright*, 2 B.

surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for by supposing a surrender; and therefore, a surrender may be presumed: Where, (q) therefore, the owner of the inheritance executed a marriage settlement, and afterwards conveyed his life interest to a purchaser as a security for a debt, on neither of which occasions any mention of the term was made; although afterwards an actual assignment was made by the administrator of the trustee to a new trustee for a purchaser, the court thought a surrender might be presumed.

The court will not at the instance of a defendant in an ejectment interfere against a plaintiff who lays a demise by the assignees of a bankrupt, without their previous permission, where they have given up the property to the bankrupt, and the plaintiff claims under him. In the case cited the demises were laid under the commissioners; therefore, the assignees could not prevent the execution, and the legal estate (a lease) never had been in the assignees. (r)

On a count upon two demises-by different persons for different lands, and for different terms for years, a judgment that the plaintiff should recover his said term has been held good for both *reddendo singula singulis*. (s)

In all cases in which such undertaking shall have been given, and security found, as are required by the stat. 1 Geo. IV. c. 87., (t) if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it is enacted by s. 3. of that statute that the judge shall order the execution to be staid till the 5th day of the term next following, or till the next session, assizes, or court-day, (as the case may be) which order the judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in

(q) *Doe v. Hilder*, *supra*.

(s) *Stent v. Warwick*; 1 Barnard.

(r) *Doe d. Vice v. Figgins*, 3 Taunt.

171. *Worral v. Bent*, 2 Str. 835.

the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced, or made, (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall be finally made, or the same set aside, (as the case may be). Provided always, that the last mentioned recognizance shall be immediately discharged, in case a writ of error shall be brought upon such judgment; and the plaintiff in such writ shall become bound with two sureties to the defendant in the usual manner required on bringing writs of error in England and Ireland.

The recognizances under this act are directed to be taken in the same manner as other recognizances of bail; and it is provided that no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months after actual delivery of possession to the landlord. (u)

After verdict the court will make any possible intendment to support an ejectment: therefore, where (x) there were two demises laid of the same premises for the same term, and the judgment was that the plaintiff should recover his terms, the court held that a bare possibility of the two lessors being joint-tenants, but refusing to join in a lease was sufficient; for each having an interest in the whole land, it was not improper that each should demise the whole; and the judgment would not entitle the plaintiff to hold one moment longer than he ought to have done, if it had been "term" in the singular.

Where (y) there was an ejectment and issue against seven, but the *nisi prius* roll was against five only; the *nisi prius* roll was amended by the issue roll.

On motion to set aside an ejectment for non-payment of rent, and restore possession upon payment of rent due and costs, the rent must be computed to the last rent-day, and not to the day of computing, inasmuch as the rent only becomes due on the days of reservation. (z)

The landlord in ejectment having recovered by verdict, the tenant still continued in possession; the landlord distrained for rent due

(u) Stat. 1 Geo. IV. c. 87. s. 4.

ter, Comb. 293.

(x) *Morres v. Barry*, 2 Str. 1180.

(z) *Dec d. Harcourt v. Roe*, 4

(y) *Tyne v. The Bishop of Worcester*

Taunt. 653.

after the verdict, which the tenant paid : it was held notwithstanding that the execution in ejectment could not be staid, as the tenant ought to have disputed the distress which was his remedy. (a)

If a mortgagee recover possession of the mortgaged premises in an undefended ejectment, the court has no jurisdiction to restore the possession to the mortgagor, who has not appeared, on payment of the debt, interest, and costs. But if the recovery is had against the tenant of the mortgagor, the court will set aside the ejectment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the court to stay proceedings on the terms of the stat. 7 Geo. II. c. 20., which requires appearance before the party can take the benefit of it, or the court have jurisdiction. (b)

New trials in ejectment may be obtained, even after a trial at bar : but where the point was that the evidence was doubtful, it was held that the verdict at bar should stand. (c)

The plaintiff may bring as many ejectments as he pleases ; and the court will not stay proceedings in a second ejectment, till another between the same parties on the same demise is determined. (d) But the court will stay proceedings in ejectment till the costs of a former ejectment, and also of the action of mesne profits, are paid. (e) So, on a second ejectment by a widow, the court staid the proceedings till the costs of a former ejectment brought by the husband and wife were paid ; although the rule in the former case was in the singular number, *quod dimissor querentis sit onerabilis*. (f) So, where (g) a second ejectment was brought by the son of the lessor of the plaintiff against the defendant's son, on the same title, the proceedings were staid till the costs in the former were paid. Ejectments were introduced in lieu of real actions, in which all the representatives of the parties to the first suit might be concluded for ever : the court, therefore, will not permit this fictitious proceeding to press hard on the defendant.

(a) Doe d. Holmes v. Davies, 2 B. Moor, 581.

(b) Doe d. Tubb v. Roe, 4 Taunt. 887.

(c) Smith d. Dormer v. Parkhurst, 2 Str. 1105.

(d) Martin v. Davis, 2 Barnard. 49.

(e) Doe d. Pinchard v. Roe, 4 East, 585.

(f) Doe d. Duchess of Hamilton v. Hatherly, 2 Str. 1152. Lord Coningsby's case, 1 Str. 548.

(g) Doe d. Eldon v. Roe, 2 T. R. 645.

The proceedings in ejectment will, likewise, be staid till the costs of a nonsuit in a former trial on the same title are paid, although the lands are different. (*h*) So if the defendant being evicted bring ejectment for the same premises, he must pay the costs of the former. (*i*) He cannot, however, bring such an action till he has delivered up possession. (*k*)

Where (*l*) an ejectment had been brought in Common Pleas, and verdict for plaintiff and costs paid by the defendant, who then brought an ejectment in King's Bench for the same premises, and recovered, but was not paid his costs; and now a third ejectment being commenced in Common Pleas by the plaintiff in the first, proceedings were staid till the payment of costs in the action in King's Bench. The practice in respect to actions of ejectment as to staying proceedings is the same in both courts. (*m*)

An ejectment by a fraudulent assignee of an insolvent debtor has been staid till costs in former actions by the debtor himself were paid. (*n*)

Where (*o*) a rule has been obtained for staying the proceedings in an ejectment till the costs in a former ejectment have been paid, the court will not interfere or permit the defendant in case those costs are not paid before a certain day to be named by the court to *non pros* the plaintiff in the ejectment pending. In the case cited, however, the twenty years had nearly expired; and to have permitted the motion would have been to deprive the party of his remedy.

Proceedings in ejectment will not be staid till the costs of a bill in equity for the same premises are paid. The costs in law are the legal consequences of the suit: but costs in equity are in the discretion of the chancellor, and depend on circumstances. (*p*) Neither are costs demandable by the rules of the court for a number of ejectments where the plaintiff has made the defendant attend at several assizes, but countermanded the trial

(*h*) Keene d. Angell v. Angell, 6 T. R. 740.

(*i*) Throutout d. Williams v. Holdfast, 6 T. R. 223.

(*k*) Fenwick v. Grosvenor, Cas. temp. Holt 266.

(*l*) Doe d. Walker v. Stevenson, 3 B. and P. 22.

(*m*) See Hullock's Costs, 445.

(*n*) Doe d. Chambers v. Law, 2 Bl. 1180.

(*o*) Doe d. Sutton v. Ridgeway, 5 B. & A. 523.

(*p*) Doe d. Williams v. Winch, 3 B. and A. 602.

in time to save costs. Therefore, on an application to stay proceedings in the last, till the costs should be paid for the former, the court refused to do it. (*q*)

An action on the case cannot be maintained to recover damages against the lessor of the plaintiff in a vexatious ejectment. (*r*) But where (*s*) in ejectment a verdict was found for the plaintiff, but upon an agreement between the defendant and lessor of plaintiff the defendant was to hold till the end of the term; and according to this agreement he held for two years, but afterwards, before the two years expired, the lessor of the plaintiff took out execution; it was held that the defendant's remedy was by action on the case, and that there could be no rule for restitution founded on this agreement.

Where (*t*) a second ejectment is brought by the defendant, after an acquiescence of twenty years, the court will presume that the proceedings under the first were regular, till the contrary be shewn. Where, therefore, a declaration had been served by the landlord upon the tenant under the statute 4 Geo. II. c. 28., (*u*) and judgment had been obtained against the casual ejector, and a writ of possession issued, and possession was delivered: after an acquiescence of twenty years, on a second ejectment by the tenant, the court held that it might be presumed that the former ejectment had been brought on the usual affidavit of half a year's rent being due, especially as the proceeding was under the statute.

Where (*x*) an ejectment had been brought on the demise of an infant which had been compromised, and the tenant in possession had attorned to the infant, though the lessor of the plaintiff on coming of age did no act to confirm the tenancy, yet as the former ejectment was brought at his suit, and for his benefit, it was held that he could not bring a fresh ejectment without notice. In this case Lord Kenyon, C. J. said, the agreement was binding in equity, and capable of being enforced there; and, therefore, the defendant could not be considered a trespasser. If there had appeared any thing fraudulent in the first ejectment, or in the

(*q*) *Thrustout v. Troublesome* d. Park, 2 Str. 1099.

(*r*) *Purton v. Honnor*, 1 B. and P. 205. *Saville v. Roberts*, 1 Salk. 14.

(*s*) *Wood v. Markham*; Styl. 408.

(*t*) *Doe d. Hitchings v. Lewis*, 1 Burr. 614.

(*u*) *Ante*.

(*x*) *Doe d. Miller v. Noden*, 2 Esp. N. P. C. 528.

agreement under it, he should have ruled that the defendant should take no benefit under it.

Courts of equity will restrain vexatious ejectments, and grant a perpetual injunction to quiet the tenant's possession. (*y*)

Where (*z*) the growing crops of the tenant had been seised under a *feri facias*, and a writ of *habere facias possessionem* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded upon a demise made long before the issuing of the *feri facias*, it was held that the sheriff was not bound to sell the crops, inasmuch as they could not be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: but it was likewise held that the landlord could not be allowed a year's rent, the statute 8 Ann. c. 14. contemplating an existing tenancy which in this case must have ceased on the day of the demise in the ejectment.

The lessor of the plaintiff cannot release the action; for, though the action be fictitious for some purposes, yet, with respect to the record, the parties on the record are real parties, and can alone release the action. (*a*)

After verdict in ejectment for a messuage and tenement, the court gave leave to enter the verdict according to the judge's notes for a messuage only, without obliging the lessor to release the damages which were merely nominal. (*b*)

Ejectment being a feigned action the lessee cannot release the costs. (*c*) So if he release the action or the subsequent action for mesne profits, he may be committed for a contempt. (*d*) And if the tenant procure a lease from the nominal plaintiff, the court will order it to be delivered up, and permit the landlord to proceed. (*e*)

Where (*f*) the landlord appeared without the tenant, and after a verdict for the plaintiff he brought a writ of error, the court held that the plaintiff could not be permitted to sue out execution, for the landlord was in the same situation as the tenant; and if the

(*y*) *Barfoot v. Fry*, Bunb. 158.
Shine v. Gough, 1 Ball. and Beatt.
436.

(*z*) *Hodgson v. Gascoigne*, 5 B. and
A. 88.

(*a*) *Doed. Byne v. Brewer*, 4 M. and
S. 300.

(*b*) *Goodtitle d. Wright v. Otway*, 8
East. 357.

(*c*) *Close v. Vaux*, Comb. 8.

(*d*) *Cas. temp. Holt* 287.

(*e*) *Payne v. Rogers*, Dougl. 407.

(*f*) *Jones v. Edwards*, 2 Str. 1241.

error had been brought by the tenant, it would have been undoubtedly a supersedeas.

The plaintiff, having judgment to recover his term, it is said, may enter without suing out a writ of possession: for where the land recovered is certain, the plaintiff may enter at his peril, and the assistance of the sheriff is only to preserve the peace. The usual way, however, is to make out a writ of *habere facias possessionem*, which being engrossed, signed, and sealed, and a *præcipe* being made out for it, is carried to the office of the sheriff who makes out a warrant thereon, and will put the lessor of the plaintiff into possession. This writ has relation to the teste; and, therefore, it may be sued out after the death of the lessor of the plaintiff, if tested previously to it. (g)

The plaintiff must take care not to take out execution for more than he had a right to recover; and, in order that the sheriff may not be under any difficulty in executing the writ of possession, the practice now is, for the plaintiff not only to point out to the sheriff the premises of which he is to deliver possession, but to take possession only of that part to which he has title. Should he take more, the court will set it right upon a summary application, without putting the defendant to the necessity of a new ejectment. (h) It is also usual for the lessor of the plaintiff to give the sheriff an indemnity for executing the writ. (i)

If there are several messuages in the possession of different tenants, the sheriff must give possession of each separately. (k) If denied entrance into a house, he may use force to execute the writ; (l) and the process is not completely executed till the sheriff and his officers are gone, and the plaintiff left in quiet possession. (m) Where, (n) therefore, upon the *habere facias possessionem*, the sheriff returned that in the execution of the said writ he took the plaintiff with him, and came to the house recovered and removed thereout a woman and two children, which were all the persons, which upon a diligent search he could find in the said house, and delivered to the plaintiff peaceable possession to

(g) *Doe d. Beyer v. Roc*, 4 Burr. 170.

(i) *Semain's case*, 5 Rep. 91. b.

(h) *Roe d. Saul v. Dawson*, 3 Wils. 49.

(m) *Kingsdale v. Mann*, 1 Salk. 321.

Anon. 6 Mod. 115.

(j) 2 Tidd. Pr. 1058.

(n) *Upton and Well's case*, 1 Leon. 145.

(k) 2 Roll. Abr. 886.

his thinking, and afterwards departed; and immediately after three persons which were secretly lodged in the said house expelled the plaintiff again, upon notice of which he returned to the said house to put the plaintiff in full possession; but the others did resist him, so as without peril of his life, and of them that were with him in company, he could not do it. Upon this return the court awarded a new writ of execution for that the same was no execution of the first writ, and awarded also an attachment against the parties.

An ouster, however, does not appear to be a contempt, unless it be recent: therefore, where (o) some hours after the sheriff was gone, and after the plaintiff had been in possession during that time, the defendant came and turned him out, the court did not consider this a disturbance of the execution; therefore, they granted a rule to shew cause why the attachment should not go. The attachment has, however, been made absolute in the first instance against the tenant in possession on affidavit that he had been served with a rule of court, made absolute, for delivering the possession, and had refused to do so. (p)

Where a stranger turns the plaintiff out of possession after execution fully executed, the plaintiff is put to his action, or to an indictment for forcible entry. The reason is, that the title was never tried between the plaintiff and the stranger; who possibly may claim the land by a title paramount to that of the plaintiff, or he may come in under him: and then the recovery and execution in the former action ought not to hinder the stranger from keeping the possession to which he may have right. (q) The court also at their discretion will set aside a writ of possession regularly executed, and let in the landlord to try on suggestion of collusion. (r)

In the case (s) in Keble above cited it is said that against a defendant the plaintiff may have a new writ of *habere facias* as well as an attachment, after a writ executed: but in a recent case, (t) where the lessor of the plaintiff had been put in possession by a writ of *habere facias*, on the 22d February, 1806, and

(o) *Kingsdale v. Mann*, 6 Mod. 27.

(p) *Doe d. Grocers' Company v. Roe*,

(p) *Davies d. Povey v. Doe*, 2 Bl.

5 Taunt. 205.

Rep. 892.

(s) *Ratcliff v. Tate*, *supra*.

(q) *Ratcliff v. Tate*, 1 Keb. 779.

(t) *Doe d. Pate v. Roe*, 1 Taunt.

Lovelace v. Ratcliff, 1 Keb. 785.

55.

it was stated that on the 10th October, 1807, while he continued in possession, the defendant entered by force, and still forcibly held the same, and resisted with violence his attempts to regain the same: the court held that no new writ could issue, although the sheriff had not returned the former writ. They denied the case in Keble. An *alias* could not issue after a writ executed: if it could, the plaintiff by omitting to call for the return of the writ might retain the right of suing out a new *habere facias*, as a remedy for any trespass which the same defendant might commit within twenty years after the date of the judgment.

If the writ be returned by the sheriff (as fully executed), though not filed, no new *habere facias* can issue; because, when the return is made, it becomes a record, which the court is entitled to. (u) And in a case (v) where judgment had been signed against the casual ejector, and possession had been delivered for a month, and the landlord who had been admitted defendant went down and prevailed with the tenants to attorn to him on giving them security, and then the plaintiff in ejectment moved for a new writ of possession, the court refused to relieve him, because there had been a regular execution of the first writ; and they said the distinction was that if immediately after the writ had been executed the tenants had attorned, there should have been a new writ, but not where the possession had continued as delivered so long as it had in this case. (x)

Habere facias possessionem cannot issue after the expiration of a year without a *scire facias*: but where the judgment was with a *cesset executio* for a year and a half, it was held that it might be without a *scire facias*. (y) After judgment where there are several plaintiffs or defendants, and one dies, execution may be taken out by or against the survivors without *scire facias*. (z)

If the delay of execution be by injunction of the Court of Chancery, it was formerly thought that there must be a *scire facias*: for an injunction not being a matter of record, a court of law, it was said, would not take notice of it. The course suggested under such circumstances was to take out the writ of execution, and continue it down by *vicecomes non misit breve*, which would

(u) 2 Brownl. 216, 253.

(v) *Goodright v. Hunt*, 2 Str. 830.

(x) But see *supra*.

(y) *Withers v. Harris*, 2 Ld. Raym.

808. Cas. temp. Holt 265. See *Proctor v. Johnson*, 1 Lord Raym. 669.

(z) *Anon.* 3 Salk. 319.

have been no breach of the injunction, and have saved the *scire facias*. (b) But this doctrine seems to have been over-ruled by the more recent case of *Michell v. Cue*, (c) where it appeared that the whole delay had arisen from the conduct of the defendants by obtaining injunctions from the Court of Chancery. The court having considered the cases before cited, were unanimous that the rule of reviving a judgment above a year old by a *scire facias*, before suing out execution upon it, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by the defendant under the circumstances, who was so far from being surprised by the plaintiff's delay, that he himself had been trying all manner of methods whereby he might delay the plaintiff. The rule to set aside the execution for irregularity was discharged with costs.

If the plaintiff die within a year and a day, his executors cannot take out execution without a *scire facias*, for they are not parties to the judgment: though, if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death, because the authority is from the court, and not from the party. If, after judgment and before execution, the defendant dies, and a *scire facias* goes forth, it must be against the terretenants, and not against the executor, without naming him as terretenant. (d) *Scire facias* after judgment by default against the casual ejector should go against the terretenant as well as the defendant. (e)

Where (f) the plaintiff is nonsuited at the trial for want of the defendants confessing lease, entry, and ouster, it has been before observed, that he is not entitled in the K. B. to sign judgment against the casual ejector, nor, consequently, to issue execution till the *postea* comes in on the day in bank: but the practice seems to be otherwise in C. B. (g)

Where however, in K. B., in ejectment the landlord is admitted to defend on the tenant's not appearing, upon which non-appearance judgment is signed against the casual ejector,

(b) *Winters v. Lightbound*, 1 Str. 301.
Booth v. Booth, 1 Salk. 322. S. C. 6
 Mod. 288.

(c) 2 Burr. 660.

(d) *Eyres v. Taunton*, Cro. Car. 295,
 312.

(e) *Withers v. Harris*, 1 Salk. 258.

(f) *Doe d. Lord Palmerston v. Copeland*, 2 T. R. 779.

(g) *Throgmorton d. Fairfax v. Bentley*, (n. a.) 2 T. R. 780.

with a stay of execution till further order; if the plaintiff be afterwards nonsuited at the trial, on account of the landlord's not confessing lease, entry, and ouster, the lessor of the plaintiff must apply for leave to take out execution against the casual ejector: and it is likewise usual to apply to the court for the same purpose after verdict, where the landlord has appeared at the trial, and confessed lease, entry, and ouster, although it has been said not to be necessary. In the case of a nonsuit, however, although if execution is taken out without application to the court, it is error, yet if the landlord omit the opportunity of shewing it for cause of error, the execution is regular, and cannot be set aside. (*h*)

After verdict and judgment against the tenant a *fi. fa.* or *ca. sa.* for the damages and costs may be included in the same writ.

Where an ejectment was brought against a feme sole, who married before trial, and a verdict and judgment was had against her in her original name, it was held to be regular to issue an *hab. fac. poss.* and *fi. fa.* against her in the same name, though the *fi. fa.* was inoperative, because she had no goods; and the writ said nothing of the goods of her husband. (*k*)

A writ of error regularly sued out is a *supersedeas* of execution in the K. B. from the time of its allowance, (*l*) or in the C. B. from the delivery of it to the clerk of errors, (*m*) provided bail when requisite be put in thereon in due time. (*n*)

By the consent rule the defendant undertakes to appear and receive a declaration; the necessity, therefore, of an original writ, if the proceedings are in the C. P., is superseded: but when a writ of error is brought the plaintiff must file an original, unless it be after verdict, when it is helped by the stat. 38 Eliz. c. 14. So in K. B. there is no necessity, except when writ of error is brought for a *latitat*, or bill of ejectment. But the party must file bail before he can proceed. The reason is that the court has

(*h*) 2 Tidd. Pr. 1012, 1057. 2 Burr. 321. 1 Burr. 340.

757.

(*k*) Doe d. Taggart v. Butcher, 3 M. & S. 557.

(*l*) Perkins v. Wollaston, 1 Salk.

(*m*) Sykes d. Oates v. Dawson, 2

Barnes 170. 8vo.

(*n*) Jaques v. Nixon, 1 T. R. 279.

no authority to proceed in ejectment by bill, unless the defendant is in custody : therefore, by the rule, bail is ordered to be filed, that the court may have authority to proceed. (o) He must also file a bill of ejectment besides the plea roll in case of a writ of error brought, before errors assigned.

The casual ejector cannot bring error, being a mere nominal defendant ; the writ, therefore, can only be brought, where the defendant has appeared and confessed lease, entry, and ouster. (p) So if the landlord be admitted to defend, a writ of error cannot issue in the name of the casual ejector. (q)

By the 16 and 17 Cha. II. c. 8., made perpetual by the 22 and 23 Cha. II. c. 4. (r) no execution shall be staid in any of the courts of record at Westminster, or in the counties palatine, or in the courts of great sessions in Wales, by writ of error, or *supersedeas* thereon, after verdict and judgment in any action of ejectment, unless the plaintiff in error shall be bound to the plaintiff in ejectment in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition that if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff in error, or the plaintiff in error be nonsuited in such writ of error, that then the said plaintiff in error shall pay such costs, damages, sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit. And, to the end that the same sums and damages may be ascertained, it is further enacted that the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to enquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in ejectment ; and upon the return thereof judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit.

With respect to this last clause it may be observed that in a case reported in 3 Burr. 1823, (s) it appears that the court obliged the plaintiff in error to enter into a rule not to commit waste, or destruction, during the pendency of the writ of error. The plain-

(o) Runn. Ejectment, 204.

(p) George d. Bradley v. Wisdom,

2 Burr, 757.

(q) 2 Burr. 757. 2 Sell. Pr. 205.

(r) Qu. Irish Statute ?

(s) Wharod v. Smart,

tiff did not oppose, and entered into the rule, and also justified bail to the amount of 400*l*.

Though the stat. 16 and 17 Cha. II. provides that no execution in ejectment shall be stayed, unless the plaintiff in error is bound for the costs in case judgment be affirmed ; yet, by reasonable construction, it is sufficient, if he procure proper sureties, to enter into the recognizance of bail. The practice in K. B. is to take the recognizance in double the improved rent, and the single costs of the ejectment. (*t*) There are some advantages in this practice; for the sureties may be examined as to their sufficiency, whereas the plaintiff in error himself could not. In some cases, as in that of infants and *femes covert*, who cannot enter into recognizances, this mode of proceeding seems to be necessary. (*u*)

In the C. B. the clerk of errors governs himself in fixing the penalty of the recognizance by the amount of the rent, and takes the recognizance in two years' rent or profits, and double costs. (*x*) And where the plaintiff in error enters into the recognizance, it is not necessary for him in that court or in K. B. to give the defendant in error notice, (*y*) for he cannot be examined as to his sufficiency; (*z*) but, where bail in error are put in, notice should be given in order that they may be examined as in other cases. In the exchequer bail in error on an ejectment must justify in double the improved annual rent or value of the premises recovered. But bail in error are not chargeable for the mesne profits in an action upon the recognizance, until they have been ascertained by writ of inquiry, pursuant to the stat. 16 and 17 Cha. II. c. 8. s. 3. (*a*)

It will follow from what has been said that under the stat. 16 and 17 Cha. II. c. 8., the defendant is entitled by law to the writ, if he offers to become bound as the law directs. Therefore, where the lessor of the plaintiff swore that the defendant was insolvent, and also that he, the lessor, had a mortgage on the land for more than it was worth ; yet the court held that the

(*t*) *Thomas v. Goodtitle*, 4 Burr.

2501.

(*u*) *Keene d. Lord Byron v. Dear-*
don, 8 East. 298. Imp. Pract. 706.

(*x*) *Doe d. Webb v. Goundry*, 7
Taunt. 427.

(*y*) *Ibid.*

(*z*) *Keene d. Lord Byron v. Dear-*
don, 8 East. 299.

(*a*) *Doe v. Reynolds*, 1 M. and S.

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defendant was entitled to his writ of error, he becoming bound in double the rent. (b)

If the plaintiff, after obtaining a verdict in ejectment, sues out a writ of *hab. fac. poss.* without waiting to tax his costs, the defendant's writ of error will not be a *supersedeas*. For if the plaintiff choose to waive the taxation of his costs, and proceed for the possession only, it is competent to him to do so: the inconvenience urged was, that the plaintiff not having taxed his costs, the amount of the penalty of recognizance of the bail in error could not be ascertained. (c)

Upon affirmance of the ejectment, the plaintiff in error must pay both the costs and mesne profits in an action on the recognizance, although the action is brought on the recognizance only for damages. (d)

In ejectment, if there be judgment for the plaintiff, and the defendant bring a writ of error, the court of K. B. will not suffer the latter to proceed in a new ejectment on the same title, till he has quitted possession, or the tenants have attorned to the lessor of the plaintiff. (e) So, if there be judgment for the defendant in ejectment, and the lessor of the plaintiff bring writ of error, the court will not suffer him to proceed in a new ejectment on the same title, until the costs are paid of a former ejectment, unless he can satisfy them that the writ of error is brought with some other view than to keep off the payment of costs. (f)

If the defendant bring a writ of error in ejectment, and enter into a recognizance pursuant to the stat. 16 and 17 Cha. II. for the costs, the plaintiff on judgment in his favour, on the writ of error, need not bring a *scire facias* or action of debt on the recognizance, but may sue out an *elegit* or writ of inquiry to recover the mesne profits since the first judgment in ejectment. (g)

After a landlord has recovered in ejectment against his tenant, he may bring an action of debt for double value, for the time

(b) *Thomas v. Goodtitle*, 4 Barr. 2501.

(c) *Doe d. Messiter v. Dyneley*, 4 Taunt. 289.

(d) *Doe v. Roach*, Cas. temp. Hardw. 373.

(e) *Fenwick v. Grosvenor*, 1 Salk. 258.

(f) *Grunble v. Bodily*, 1 Str. 554.

(g) 2 Sell. Pr. 226

during which he held over after the expiration of the notice to quit, because the double value is a penalty given for contumacious holding over, and does not recognize the relation of landlord and tenant. (*h*) But when a tenant has held over on a void lease, the landlord cannot maintain debt for double value after a recovery in ejectment, for the act could never be intended to apply to a case where the resistance on the part of the tenant was under a fair claim of right. (*i*)

IV. An ejectment being a feigned action brought against a nominal defendant, and usually upon a supposed ouster, is not considered a proper action to recover from the real tenant the profits which he has received during the time that he has held the premises recovered. The verdict in ejectment merely establishes the fact that the right to the land was in the plaintiff or his lessor, from the time that the title of the plaintiff or of his lessor accrued: from that time the defendant is a trespasser; and damages may be recovered from him for his unjust possession, equal to the value of the land during that time, and the proper action for this purpose is an action of trespass *vi et armis*.

The action of trespass for the mesne profits, is therefore consequential to the recovery in ejectment. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal plaintiff. In either shape it is his action.

This action will lie by one tenant in common after he has recovered in ejectment against the other; (*k*) and it may be brought, though error be pending; (*l*) in which case the plaintiff may proceed to ascertain his damage and sign judgment: but the court will stay execution pending the error. (*m*) And if the plaintiff has recovered different lands against several in the same ejectment, he may bring several actions against the occupiers, and the court cannot compel him to consolidate them. (*n*)

If the action be brought by the nominal plaintiff, the court on application will stay the proceedings till security be given for costs. The release also of the action by such a plaintiff will be

(*h*) *Soulsby v. Nevins*, 9 East. 310.

(*i*) *Donford v. Ellys*, 12 Mod. 152.

(*j*) *Wright v. Smith*, in the Exch.

(*m*) 2 Sell. Pr. 226.

5 Esp. N. P. C. 203.

(*n*) *Stacey v. Sutton*, Cas. temp.

(*k*) *Goodtitle v. Tombs*, 3 Wils. 118. Hardw. 137.

considered a contempt: (*o*) but, as was observed by Lawrence, J. in *Bauerman v. Radenius*, (*p*) Lord Holt did not say that the release would not defeat the action. This therefore seems to be the most that a court of law can do in cases of this kind. (*q*)

The declaration in this action must expressly state the several parcels of lands from which the profits arose, or the defendant may plead the common bar. (*r*) If the declaration do not state the time when, &c. but only state that the defendant kept possession for a long space of time, the defect, although bad on special demurrer, will be cured by the operation of the stat. 4 Ann. c. 16., after judgment by default and a writ of inquiry executed; so that no objection can be taken in arrest of the final judgment for such a defect of form. Bayley, J. observed that the want of alleging a certain time could only be matter of form: for the plaintiff would not have been tied down to proof of the particular day if he had stated it. (*s*)

There is said to be this difference between an action by the lessor and one by the nominal plaintiff, that the defendant can defend his title against the lessor, but not against the lessee, because he is estopped: (*t*) but the better opinion seems to be that the judgment in ejectment in either case will conclude the defendant, since the lessor of the plaintiff and the plaintiff are in effect the same person. But beyond the time laid in the demise it proves nothing, nor any thing as to the value; therefore it must be proved how long the defendant occupied, and what the value is, and that the occupation was within the time laid in the demise. (*u*)

The judgment in an action of ejectment on the several demises of two or more persons is evidence for them in an action of trespass brought by them jointly; for the judgment is consistent with their being tenants in common, and in respect of such tenancy they may jointly maintain trespass. (*x*) It is no evidence against a preceding occupier: (*y*) nor is judgment in ejectment

(*o*) *Per* Holt, C. J. in 1 Salk. 260.

(*p*) 7 T. R. 669.

(*q*) See 2 Tidd. Pr. 706.

(*r*) 2 Crompt. Pr. 223.

(*s*) *Higgins v. Highfield*, 13 East. 407.

(*t*) *Clarke v. Bosse*, 1 Freem. 534.

(*u*) *Aslin v. Parkin*, 2 Burr. 665.

Gipps v. Wollescott, 3 Salk. 360.

Jefferies v. Dyson, 2 Str. 960. *contra*.

(*x*) *Chamier v. Clingo*, 5 M. and S. 64.

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(*y*) Bull. N. P. 67.

against a woman evidence against her and her husband; for the parties are not the same, and the estoppel operates only between the same parties. (z) In such cases there is no evidence of trespass, but the judgment in ejectment; and the wife's confession of trespass committed by her cannot be given in evidence to affect the husband in an action in which he is liable for damages and costs.

The judgment in ejectment is conclusive only as to the subject matter. It is therefore no evidence of title before the time laid in the demise; and if the plaintiff seek to recover damages for a wrongful possession antecedent to the day of the demise, he must prove his earlier title, which the defendant will be at liberty to controvert. (a) And in all cases the defendant may protect himself by pleading the statute of limitations, from the payments of the mesne profits beyond six years. (b)

Where judgment in ejectment has been by default against the casual ejector, proof of actual possession by the plaintiff is necessary to support the action which is founded on an injury to the possession. To prove this an examined copy of the writ of possession and of the sheriff's return are usually given in evidence, and an entry under the writ of possession will be referred to the time when the title accrued. But where the judgment is after verdict against the tenant in possession, who has appeared and confessed lease, entry, and ouster, the plaintiff's possession seems to be sufficiently shewn by the common consent rule, without proving the writ of execution. (c) If the plaintiff has been let into possession with the consent of the defendant, this is sufficient to entitle him to maintain the action for mesne profits, though no writ of possession has been executed. (d)

Where premises were in the possession of a tenant, and there was judgment against the casual ejector, in an action of trespass for mesne profits and costs of ejectment against the landlord Lord Ellenborough, C. J. thought the judgment in ejectment no evidence against the defendant, without proof of notice of the ejectment, but that a subsequent promise by him to pay the rent

(z) *Dean v. White*, 7 T. R. 112.

Comb. 453.

(a) Bull. N. P. 87.

(d) *Calvert v. Horsfall*, 4 Esp. N. P.

(b) 3 Wils. 121.

C. 167.

(c) Bull, N. P. 87. See *Bell v. Clark*,

and costs amounted to an admission that he was liable to the action. (e) So, if no writ of possession has been executed after judgment against the casual ejector, the defendant in possession may controvert the title, if he was not made defendant in the ejectment, for there is no verdict against him. (f)

Bankruptcy has been held to be no plea in bar to this action; for the plaintiff goes for the whole damages occasioned by the tort; and, when damages are uncertain, they cannot be proved under the commission. (g) So also since it is enacted by the stat. 1 Geo. IV. c. 119. that the order for the discharge of an insolvent shall specify the several debts to which the discharge shall apply, such a discharge appears to be no bar to an action for mesne profits. (h)

Upon the general issue evidence is not admissible that the plaintiff had accepted the rent of the premises for the time in dispute, and had agreed to waive the costs of the ejectment; for such a defence is in substance that a part of the damages had been accepted in satisfaction for the whole, whereas the plea was that no trespass had been committed. (i)

The action being for tortious occupation, the damages are unliquidated, and therefore cannot be paid into court; neither is the rent any measure of them, since the jury may give what damages they please. (k) But if the plaintiff in the action for mesne profits recover less than 40s., and the judge do not certify that the title came in question, the plaintiff can recover no more costs than damages. (l)

Where (m) after a recovery in ejectment and before an action for mesne profits the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in executing the writ of inquiry on the action for mesne profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs of the ejectment as a debt under the commission.

The nominal plaintiff in ejectment, in whose name the mesne

(e) *Hunter v. Britts*, 3 Campb. N.P. C. 455.

(f) 2 Str. 960. *Jefferies v. Dyson*.

(g) *Goodtitle v. North*, Dougl. 584.

(h) See 1 Tidd. Pr. 397. and the

Appendenda.

(i) *Doe d. Hill v. Lec*, 4 Taunt. 459.

(k) *Holdfast v. Morris*, 2 Wils. 115.

(l) *Doe v. Davies*, 6 T. R. 593.

(m) *Gulliver v. Drinkwater*, 2 T. R.

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profits have been recovered, may sue for an escape in execution of the mesne profits. (n)

Any one in possession of the premises after a recovery of them by action of ejectment is a trespasser, and as such liable to damages, though not perhaps amounting quite to the mesne profits: neither can a stranger cover himself by alleging the licence of the defendant, for no one can license another to do an illegal act. (o)

The plaintiff can recover no further costs in this action than were taxed in the ejectment, if it was regularly defended: but it is otherwise, if judgment was against the casual ejector. (p)

The costs of the ejectment, where the defendant suffers judgment to go by default, may be recovered in this action under that part of the declaration in which the plaintiff complains of having been obliged to expend money in recovering possession of the premises. (q)

By the stat. 1 Geo. IV. c. 87. s. 2. the judge before whom an ejectment is tried between landlord and tenant is enabled, whether the defendant shall appear or not, to permit the plaintiff at the trial after proof of his right to recover the whole or part of the premises in possession to go into evidence of the mesne profits, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the plaintiff shall in such case give their verdict upon the whole matter, both as to the recovery of the premises and the mesne profits; provided that nothing in the act shall be construed to bar the landlord of his action of trespass for mesne profits, which shall accrue from the verdict, or the day so specified as aforesaid to the day of the delivery of the possession.

There is a concurrent remedy in equity by account for mesne profits: but the rule is the same as at law; for no bill can be filed in equity for an account till the possession is recovered by ejectment. (r)

In equity any person in possession of an estate may bring a

(n) *Doe v. Jones*, 2 M. and S. 473.

(g) *Doe d. Hill v. Lee*, 4 Taunt.

(o) *Gudlestone v. Porter*, K. B. M. 459.

39 Geo. III. *Woodfall's Landlord and Tenant*, 418.

(r) 1 Atk. 525. *Sayer v. Peirce*, 1 Vez. 232.

(p) 1 Esp. N. P. R. 358.

bill to discover the title of a person bringing an ejectment, and pray that he may set it out, and say whether the title be not in some other, in order that he may make a defence; even considering him a wrong doer against every body else. (*s*)

The statutes 5 Rich. II. st. 1. c. 8. and 15 Rich. II. c. 2. punish forcible entries as offences of a criminal nature by imprisonment. The statutes 8 Hen. VI. c. 9., 31 Eliz. c. 11., and 21 Jam. I. c. 15., as well as the Irish stat. 10 Ch. I. st. 3. c. 13., provide the remedy of restitution for such an injury. The stat. 8 Hen. VI. c. 9. provides that after complaint made to the justices of the peace of the county, or one of them, they shall within a convenient time cause the provisions of the stat. 15 Rich. I. c. 2. to be executed. And by s. 3., whether such persons making the entry shall be present or not, the justices may inquire in some town next the tenement, or other convenient place, by the people of the county, as well of them that make such forcible entries, as of them that hold the same by force; and if it be found that any doth contrary to the statute, the justices shall cause the said lands to be reseized, and put the party so put out into full possession. And if any person after such entry make a feoffment or other discontinuance to any person for maintenance, or to defraud the possessor of his recovery; if after in the assize or other action such feoffments be found to be made for maintenance, such feoffment shall be void. By s. 6. mayors or justices of the peace, sheriffs, and bailiffs of cities and boroughs having franchise, have power to make similar inquiries. By 31 Eliz. c. 11. no restitution can be made in this way where the party indicted has had possession for three years next before the indictment found. But by the stat. 21 Jam. I. c. 15. the remedy by restitution is extended to tenants for years, tenants by elegit, statute merchant and staple. The Irish stat. 10 Ch. I. sess. 3. c. 13. adds the clause, that every justice of the assize shall have the same power of inquiry as justices of the peace.

If a landlord enter with a strong hand to dispossess the tenant, he may be indicted under these statutes: but a tenant holding over cannot distrain for damage feasant the landlord's cattle which are put on the premises by way of taking possession. (*l*)

(*u*) *Metcalf v. Harvey* 1 Vez. 249.

(*l*) *Taunton v. Costan*, 7 T. R. 431.

V. In conclusion, it is necessary briefly to notice the doctrine of merger, before we treat of surrender. Merger has sometimes been considered as a surrender in law; and, indeed, the main distinction between the two relates chiefly to the mode of their operation. In a surrender it is requisite that the tenant of the particular estate should relinquish it in favour of the next vested estate in remainder or reversion. On the other hand, the doctrine of merger is usually confined to those cases in which the estate in remainder or reversion comes to the tenant of the particular estate. Merger, as well as surrender, may be conditional; and it may operate as to one part of the land, and not as to another.

A term for years, or an estate for life, may be extinguished when there is a union of the fee or freehold and the particular estate in the same person, either in the same or different legal rights with a few exceptions. The intervention, however, of any vested estate in remainder will prevent a merger. An *interesse termini* will be no impediment, because it is not a vested estate; neither will the merger have any effect upon the *interesse termini*. (u) So an estate in joint tenancy will not prevent a merger as to one moiety or other joint share; for the merger will be a dissolution of the jointure, and the estate is said to be executed as to such moiety or other joint share. (x)

If a lease for years be made to A., and the lessor makes a feoffment to B. with a letter of attorney to A. to deliver seisin, and he makes livery accordingly, this act being purely ministerial, will not extinguish the term; though it may be proper for A. after the livery to enter in order to secure his term, and settle the reversion, which was all that was intended to pass by the feoffment. (y) So merger is prevented by the express meaning, as well as by the equity, of the statute of uses. A lessee for years may, therefore, be feoffee to uses without injury to his term. (z) So he may be tenant to the *præcipe* for suffering a common recovery, although, till the recovery is suffered, there is an actual union and merger of the two estates in the same legal right: but, since after the recovery the uses are guided by the bargain and sale inrolled, it is

(u) Dy. 112. a. Northen's case, (y) Co. Litt. 52. b. Moor. 11. 280. Hotl. 55. Dy. 177. pl. 35. Shep. T. 605. Cro. Jac. 177.

276. Prest. Merg. 276.

(z) Cheyney's case, Moor. 196.

(x) Co. Litt. 182. b. 2 And. 202.

considered within the equity of the statute; and the rent and term will be revived after the recovery is suffered. (a) A lessee for years may be a relessee to uses within the same equity. (b)

Before the stat. 29 Ch. II. c. 3. and stat. 14 Geo. II. c. 20. the lessee for years of tenant *pur auter vie* would have become an occupant on the death of the lessor; and, consequently, the accession of the freehold would have merged the estate for years: but those statutes, and especially the latter, having abolished general occupancy, the merger will be prevented by the heir or executor taking the reversion by special occupancy.

The mere union of two terms in one person, whether in the same different legal rights, will not operate as a merger of either. A lessee for years may indeed surrender expressly to a termor for years; or he may take a new lease from the lessor, which will operate as a surrender in law; and in both these cases an extinguishment of his own term will take effect: but in these cases it is a question of intention; and it is presumed that a surrender is intended, because otherwise the intention of the parties would not take effect. Merger, however, has no reference to contract; and there seems to be no reason, independent of the rules of law, why the extinguishment should take place, and the result of the cases seems to be that no merger will take place under such circumstances. (c)

Where (d) the lessor mortgaged his reversion to the lessee for years, it was held to be a merger, although the lessor afterwards performed the condition on the day of payment.

Where (e) A. seized of a house called M., and two others, leased these last two to B. for twenty-one years, and then leased the same in reversion to C. for years, and then devised them, together with the house called M., to C.; and C. entered into M., and took the rent of the other two: it was held that his entry into M. vested the whole in him as devisee; and, therefore, the term in reversion became extinct.

So where (f) a lessee for years devised his term to his wife for

(a) *Ferrers v. Fermor*, Cro. Jac. 4 Burr. 1980. *Davidson d. Bromley v. Stanley*, *ibid.* 2210. 643. 2 Roll. Rep. 245. 2 Mod. 234.

(b) *Fountain v. Coke*, 1 Mod. 107. (d) 3 Leon. 6. pl. 17. *Mounson v. How v. Stile*, 2 Lev. 126. 1 And. 233. West, Gouldsb. 92.

(c) 1 Leon. 303, 332. *Shep. T.* 347. (e) *Colebourne v. Mixstone*, 1 Leon. Vin. Abr. 369. pl. 11. 369. pl. 17. and 129.

in notis. 3 Leon. 245. Cro. Eliz. 302. (f) *Johanson v. Trumper*, W. Jon. 389.

ife, remainder over, and the devisee in remainder assigned all his right and interest to the reversioner; the possession of the term was held well merged after the death of tenant for life: but it seems not till then; because before that it was only a possibility.

Notwithstanding one of two estates is held in trust, and the other is held beneficially by the same person on the same or different trusts, the doctrine will operate on these estates; because the law takes no notice of trusts: but, when the merger in law takes effect, courts of equity interpose; and will as against the person who has occasioned the injury to the beneficial owner, and against all persons claiming under such trustee, without consideration or with notice of the equitable title, support the trust by decreeing possession of the land for the time of the estate merged, or by decreeing a conveyance as the circumstances may require. (g) The accession, however, of one estate to the other by mere act of law, as by marriage, descent, by executorship, or intestacy, will not occasion a merger of one estate in the other, when they are held in different rights; and this without any distinction, whether the term accedes to the freehold, or the freehold to the term. (h)

An *interesse termini*, although it is no impediment to merger, nor is affected by it, where it relates to estates in another than the person entitled to it, yet may be itself the subject of merger, and be extinguished in the inheritance before it commences in possession. (i)

VI. We now come to treat of surrenders. A surrender is defined to be the yielding up of his estate by the tenant of the particular estate to the tenant of the next immediate estate in remainder or reversion, by which means such particular estate is extinguished.

An estate at will, among common persons, need not be surrendered, because, being at the will of both parties, either may determine it: but in the case of the king it is not at the will of both, but only at the will of the king. An estate at will held of the crown cannot, therefore, be determined by the party in any way but by surrender. (k)

(g) *The Duke of Norfolk's case*, 3 Ch. Ca. 15.

(f) *Salmon v. Swann*, Cro. Jac. 619.

(k) 1 Lord Raym 51.

(h) *Prest. Merg.* 279.

A surrender of a term in possession may be made to a reversioner for years, even where the term in reversion is for a less number of years than that surrendered; and the surrender being absolute will enure to the benefit of all those who successively take in remainder or reversion after the first lease in reversion has expired. (*l*)

Express surrenders must be in writing, (*m*) and any form of words, by which such an intention may appear, will make an express surrender: but a covenant to surrender at a future time will not operate as a surrender when the time arrives. (*n*) So express surrenders relate only to vested interests, or to interests which have been reduced into possession by entry, because till then the lessor has no reversion in which the possession may be extinguished. But if the lessee has assigned after entry, there is not the same objection to the assignee's surrendering before entry. (*o*)

In a late case (*p*) it was held that an agreement that the landlord should have immediate possession, (except as therein mentioned) of a farm, lands, and premises which had been occupied for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns, and an inclosed ground, and to have the joint use of the yard with the landlord, or the incoming tenant till the 25th of January following, without rent, was clearly a surrender of the term in the whole. The question arose upon the stamp, the stamp being an agreement stamp only; and the court were of opinion that the instrument was properly rejected in evidence on that ground.

Words and acts between strangers will not operate as a surrender. It is, however, observed by Lord Coke (*q*) that if a lessee for years be ousted by a stranger, and he release to the disseisor, the disseissee may enter, because the term is extinguished: but the release of the freehold by tenant for life under the same circumstances would not operate by extinguishment, because, he adds, the disseisor has a freehold upon which the release may enure; but he has no term of years on which the release of the lessee for years can enure.

(*l*) *Pory v. Allen*, Cro. Eliz. 173.

Hughes v. Robotham, Cro. Eliz. 34.

7 Vin. Abr. 409. E. 2 Bl. 1075. 5

Burr. 2698.

(*m*) St. 29 Cha. II. c. 3.

(*n*) *Parson's case*, Dy. 374. b.

(*o*) 2 Roll. Abr. 494. 3 Leon. 96.

(*p*) *Williams v. Sawyer*, 3 Brod. and B. 70.

(*q*) Co. Litt. 275. b. 276. a.

A. demised a farm to B. under an agreement to hold from Michaelmas 1799, to Michaelmas 1816, at a yearly rent. A. died and devised the premises to C., who in 1813 put them up to sale by auction. D. became the purchaser, and also agreed to buy B.'s outstanding term, without C.'s knowledge or assent. D. having let E. into possession became bankrupt. In 1814 C., by letter to B., admitted that E. occupied the premises, and afterwards demanded rent from him. C. and D.'s assignees afterwards executed mutual deeds of release, and D.'s assignees released E. Held that C. was entitled to recover the rent from 1813 to 1816 from B., as there had been no surrender in writing of his interest to D., and C. had not assented to E.'s being let into possession. (s)

If the reversion be in joint-tenancy, and the tenant of the particular estate expressly surrender to one joint-tenant, it will enure to both: but if he only assign his interest to one, the jointure will be severed as to a moiety, and there will be an execution of the estate for that moiety. (t)

If a feme executrix takes baron, and the baron takes a new lease, this is a surrender of the wife's term, although it be specifically bequeathed: (u) but the acceptance of a new lease by a feme covert is no surrender of her freehold. (x)

Where the lessee leases to the reversioner, reserving the reversion of a day, it does not amount to a surrender, because the day prevents the merger: (y) but if he assigns the term to the lessor it will be a surrender, although he reserve a rent. (z) Debt will lie in such a case upon the contract during the life of the lessor: (a) but there is no remedy against his executor except upon an express covenant, because the term is gone, and the only remedy is in equity. (b)

Express surrenders may be either absolute or conditional. (c) But they must be in writing, whether the lease be a parol lease (d) or in writing; whether of things which lie in grant,

(s) *Mathews v. Sawell*, 2 B. Moor. 262. (z) *Smith v. Mapleback*, 1 T. R. 441.

(t) Co. Litt. 183. a. 192. a. Perk. S. 80. See *Hill v. Bolton*, 2 Lutw. 1165. (a) *Winstone v. Pinckney*, 2 Lev. 80.

Child v. Wefcot, Cro. Eliz. 470. (b) *Lloyd v. Langford*, 2 Mod. 174.

(u) *Carter v. Lowc*, Ow. 56. Down- (c) Co. Litt. 218 b.
ing v. Seymour, Cro. Bliz. 912. (d) *Per Lord Ellenborough*, C. J.

(x) *Swaine v. Holman*, Hutt. 7. *Mollet v. Brayne*, 2 Camp. N. P. C. 104.
(y) 1 Roll. Rep. 387. 4 Leon. 30.

or of land, or other corporeal hereditaments. It has been decided that a note is as good for the purpose as a deed: but it is conceived that this must be confined to those cases where no seal was requisite before the statute. Surrenders, therefore, of the lease of incorporeal hereditaments must be by deed, because a deed was of the very essence of the title to them: so corporations can make no express surrenders without deed. (c)

A recital in a second lease of the surrender of the first is no note in writing within the statute; for such a recital may merely import that the acceptance of the second lease is a surrender by operation of law; therefore, if the second lease by being void in its creation has not that effect, the recital is nugatory, and will not operate as an express surrender. (f)

The statute of frauds made no alteration in the evidence of a surrender: whatever words were sufficient before will, if reduced to writing, still operate as a surrender since the statute. The indorsement, therefore, on a mortgage deed, although only purporting to be a receipt of money, yet, if coupled with a proviso in the deed that the term shall cease on payment of the mortgage money, will operate as a surrender, because it sufficiently shews the intention of the parties. (g)

Infants, *femes covert*, and lunatics, where they are interested in leases, and it is requisite to make surrenders for the purpose of obtaining renewals, may apply in the usual way by petition to the Court of Chancery, or any other court of equity, and may be enabled at the discretion of such court to make surrenders, by force of the statute 29 Geo. II. c. 31.: but before that statute there was no way in which infants could make an absolute surrender in law, and *femes covert* could only give their assent by *fine*. (h)

Surrender is not perfected without acceptance on the part of the remainder-man or reversioner to whom it is made. (i) Neither is acceptance of it to be presumed from rent having been paid by a third person. (k)

The stat. 11 Geo. III. c. 19. enables lunatics or their guard-

(c) 10 Rep. 67.

(f) *Leach v. Thompson*, 1 Show.

(f) *Roe d. Lord Berkeley v. The Archbishop of York*, 6 East. 86.

296.

(g) *Farmer v. Rogers*, 2 Wilson 26.

(k) *Copeland v. The Executors of Gubbins*, 1 Stark. N. P. C. 96.

(h) *Price v. Butts*, 2 Roll, 168.

ians and committees, by order of the Lord Chancellor after hearing all parties concerned upon petition, to accept surrenders, and make new leases: and leases so renewed are declared valid and effectual. By s. 3. of the same statute the fines on renewals in such cases, after the deduction of charges, are directed to be paid to the guardian or committee of the lunatic; and, on the death of the lunatic, the money arising from such fines is to be considered real estate, unless the lunatic be tenant for life only, in which case it is to be considered personal estate.

The acceptance of a parol lease before the statute of frauds was a good surrender of a lease in writing; and the statute of frauds has made no alteration in this respect, because it is a surrender by operation of law. So if a tenant from year to year, underlet the premises, and the original landlord with the consent of the tenant from year to year accept the under-lessee as his tenant, this is a valid surrender in law of the first tenancy. (*l*) But a tenancy from year to year cannot be determined, so as to bar the interest of the tenant's creditors, without a legal notice to quit, or a surrender in writing. (*m*) So, where (*n*) tenant from year to year, under an agreement for a lease of fourteen years, and the rent being in arrear, entered into an indenture with his landlord, reciting such tenancy and arrears, and that he had agreed to quit and deliver up the premises, and that a valuation should be made of his effects, and the deed assigned his effects for that purpose, it was held that this was no surrender, because the agreement was never acted upon, and the tenant never quitted.

At the common law cancelling a deed of lease of corporeal hereditaments did not destroy the continuance of the lease, because the deed was not of the essence of the contract: but the cancellation of a deed of grant of incorporeal hereditaments was a surrender by operation of law; and it may be a question how far such a surrender has been taken away by the statute. (*o*)

In the treatise on leases in Bacon's Abr. (*p*) it is observed,

(*l*) Thomas v. Cook, 2 B. and A. 134.

119. Stone v. Whiting, 2 Stark. N. P. C. 235. Whitley v. Gough, Dy. 140.

(*m*) Doe d. Read v. Ridout, 5 Taunt. 519.

(*n*) Coupland v. Maynard, 12 East.

(*o*) See Magennis v. M'Culloch, Gilb. Rep. 235. 6 East. 90., and Leech v. Leech, 2 Ch. Rep. 100. Churchwardens of St. Saviour's, Southwark, 10 Rep. 66.

(*p*) Tit. Surrender *sub. initio*.

that an estate for life, created by livery, must be defeated by an act of equal notoriety, or by express words of conveyance of the freehold; and consequently, that words of release, or any other words, not amounting to express words of conveyance of the freehold, will not operate as a surrender, although the intention be apparent to surrender all right and claim to the premises. But a *quære* is added, and the doctrine may be reasonably disputed; for livery does not appear to be necessary, and if livery be not necessary, there is no reason why a surrender should be confined to strict technical form more than other conveyances, the effect of which depends on the intention.

If the original lessee has under-leased, rendering rent, with a condition of re-entry, all rents and conditions as far as they depend upon the reversion attendant upon the under-lease, will be extinguished by the surrender: although the rent may be payable between the parties on the ground of contract. And it seems to be settled that in no case can the owner of the paramount reversion be considered an assignee within the meaning of the statute 32 Hen. VIII. (p)

(p) Chaworth v. Phillips, Moor. 876. Lord Treasurer v. Barton, Moor. 94.

OF THE LAW OF LANDLORD AND TENANT, WITH REFERENCE
EXCLUSIVELY TO IRELAND.

IN the course of the preceding pages wherever the subject has not led to any digression, a reference has been made to Irish statutes, and a short notice has been occasionally taken of the distinctions which affect the law in that country. The following part of the work consists of those statutes and cases which relate exclusively to the law of Ireland; and the arrangement pursued is nearly the same as in the body of the work.

The Irish stat. 29 Geo. II. c. 12. enacts that all bonds, contracts, covenants, and agreements between any tenants with intent to hinder or obstruct landlords, or their agents or bailiffs, in letting lands to the best advantage, or for the purpose of hindering rectors, or *impropriators*, or farmers, from letting or selling tithes to the best advantage, shall be illegal; and a penalty of 5*l.* is imposed for writing threatening letters, or any combination for the same purpose.

In Ireland archbishops, bishops, deans and chapters, archdeacons, prebendaries, and other dignitaries, parsons and vicars, the masters, and governors, and fellows of colleges and hospitals, in Ireland, are restrained by the stat. 10 and 11 Cha. I. c. 3. s. 1., from letting their possessions in any other manner than that authorised by the several acts of parliament made on that head. By the same act s. 2. they may demise the land or other heredita-

ments, (the dwelling-houses for the most part of the forty years then last past used for their habitations, and the demesne lands thereunto belonging, and therewithal during the said time used and occupied as the demesnes of the said houses only excepted,) unto any persons for the term of 21 years from the time of the making thereof, whereof there shall be no other lease or estate, which shall not be determined for the space of one year then next coming. Upon which leases shall be reserved payable unto the said lessors and their successors, during the said term of 21 years, so much yearly rent at the peril of the lessees as the moiety (q) of the true value of the said lands, &c. *communibus annis* at the time of making of such lease, shall amount unto, as the same shall appear upon a trial between the successors of such lessors, (if they shall question the same) and the said lessees or their assignees by verdict of twelve indifferent persons at the common law ; which verdict shall be peremptory on both parties, and their successors during the said term. In which leases shall be contained no power for such lessees or their assignees to commit waste, or to be punishable for waste. But by s. 3. of the same act all persons therein named are empowered by licence of the government of Ireland to make leases for longer terms of such of their lands as are fit for the building fortresses; and in consideration of the reassignment surrender and taking in of any fee farms or long leases of any lands, and on the further improvement of the yearly rents and profits, with the licence aforesaid they may lease for 60 years fee farm lands, and of such leased land the like term, or fewer if the usual term has been for fewer.

The fifth section makes an exception in favour of houses in cities and towns, belonging to the spiritual persons named in the act, similar to the English stat. 14 Eliz. c. 11.; and consequently they may be leased for any term not exceeding 40 years. (r)

By the stat. 17 and 18 Ch. II. c. 2. s. 11. all grants by archbishops and bishops of any lands or hereditaments, which should be granted to them, as an augmentation of their revenue, other than for 21 years or three lives from the making, reserving a full moiety of the yearly value, are declared void.

(q) See 35 Geo. III. c. 23. *post*. (r) See 1 Geo. II. c. 15. s. 12. Irish.

With respect however to the reservation of rent, it may be observed that by the Irish stat. 35 Geo. III. c. 23., intituled an act to amend the stat. 10 and 11 Ch. I. c. 3., the statute law in Ireland is assimilated to that of England; and provides that in all cases where archbishops, bishops, &c. were enabled to demise in the manner prescribed by the stat. 10 and 11 Ch. I. c. 3., or any other act then in force, they may do so, provided that the yearly rent reserved shall not be less than the yearly rent paid and payable thereout for the last twenty years preceding the making of the lease. But this act as well as the stat. 10 and 11 Ch. I. c. 3. excepts the dwelling-house and demesne lands belonging to the church, and to the ecclesiastical persons therein enumerated. Separate leases also may be executed of separate parts, so as the aggregate of such rents shall amount to the rent on the original lease.

By the Irish stat. 4 Geo. I. c. 14. s. 8. the archbishop of Tuam was enabled to set out 250 acres or more of the demesne lands of the see as the demesne of the archbishopric, and to demise the rest of the demesne lands in the same manner as he might other lands belonging to the see.

By the Irish stat. 12 Geo. I. c. 10. s. 3. archbishops with the consent of the Irish government, and bishops with the consent of their metropolitan, may lease bog or fenny ground belonging to their demesnes for any term not exceeding 60 years without fine, at the most improved rent that can be got for the same; provided such archbishop or bishop, over and above the land so demised, is possessed of 300 acres plantation measure, of good arable and pasture land as demesne, and reserve turbary sufficient for his dwelling-house, and the tenants of such demesne lands; also by the same statute, they may make separate leases of all such tracts of boggy or fenny land as lie contiguous to any of their demesne lands to the respective tenants, or if out of lease to any strangers for any term not exceeding 60 years in possession without fine, at the most improved or highest rent that can be got for the same. But this statute being intended only for the encouragement of cultivation provides that, after such land is brought into cultivation, such leases shall not be renewed in any other manner than that prescribed by the stat. 10 and 11 Ch. II. c. 3.

The Irish stat. 1 Geo. II. c. 15. allows all incumbents of

parishes in any city or town corporate, with the consent of the patron and ordinary, to demise any house or ground in such city or town, for any term not exceeding 61 years in possession without fine, at the most improved rent; provided it be certified by the archbishop of the province and the bishop of the diocese under their seals, that the premises so demised are over and above what is sufficient for the convenient residence of such incumbent: but such leases may be renewed for any term not exceeding 40 years, without any new certificate, provided the former rent be not lessened.

By the Irish stat. 13 Geo. II. c. 9. the dean and chapter of Christ Church, Dublin, may grant such parts of their possessions adjoining to the hall where the king's courts are held in the county of Dublin, or in the county of the city of Dublin, as the Irish government shall think proper, for any term of years.

The object of the Irish statutes, 15 Geo. II. c. 5. and 19 Geo. II. c. 16., was to set out a certain portion of the demesne lands of archbishops and bishops in Ireland, not less than 250 acres plantation measure, as an appropriate demesne for the see; and they provide that the rest of such demesnes may be leased in the same way as the other lands belonging to such sees. But since the Union some difficulty seems to have arisen from the term, "mensal lands," not being demesne lands of such archbishops and bishops. Mensal lands of a bishopric appear to be such lands as in former times were considered requisite to the maintenance of the table of the bishop; or, in other words, for the support of the hospitality suitable to his station. As they were usually in the occupation of the bishop, they have been called demesne or mensal lands indiscriminately. In process of time these lands became of greater value than they were at first and it became a disadvantage to the see that the bishop could not demise them. The stat. 15 Geo. II. c. 5. and stat. 19 Geo. II. c. 16. were accordingly passed to make a survey, and limit and set out a part only of such mensal lands as an appropriate demesne of the bishop, and to allow him to lease the rest. Commissions issued under these acts at various times, and demesnes have been set apart pursuant to their provisions. By these means the part which was not appropriated to the demesne, although they still are denominated mensal lands, have

ceased to be called demesne lands. Such mensal lands have been let at various times: but doubts having been entertained whether leases made of them according to the Irish stat. 35 Geo. III. c. 23. would be valid and effectual, the stat. 53 Geo. III. c. 92. has made an enactment with respect to them exactly similar to that of the stat. 35 Geo. III. c. 23. in the Irish Parliament.

The Irish stat. 10 Geo. I. c. 5. enables all bishops, deans, deans and chapters, and other dignitaries ecclesiastical, parsons, rectors and vicars, and all bodies corporate, colleges, cathedral or collegiate churches, hospitals, and all tenants for life with immediate remainders to their first and other sons in tail male, and tenants in dower and by courtesy with the consent of such persons as shall be seised, next in remainder or reversion after such estate in dower or courtesy, of any estate of inheritance; or in the case of the nonage, idiocy or lunacy of such remainderman or reversioner, then with the consent of the guardian of such minor, or the committee of such idiot or lunatic, and with the approbation of the Lord Chancellor of Ireland; to make leases in possession for terms not exceeding 31 years, of all mines and minerals within their respective manors, glebes, or lands, without any fine or other consideration than the yearly rent reserved in such leases, and so as the most improved rent that can be reasonably gotten for the same be reserved on every such lease, and that such rent be not less in value than one tenth part of the ore raised out of such mines, without regard to the expense of digging, raising and laying the same on the bank, and so as such rent shall be reserved payable to such lessors, or such other persons as should during the continuance of such lease have been entitled to the benefit of such mines and minerals in case this act had not been made. Where any such lease shall be made by any person tenant for life, not dispunishable of waste, with immediate remainders to his first and other sons in tail, it is provided by the second section that two fifth parts of the yearly rent shall be made payable to the tenant for life, and the other three fifth parts to the persons in remainder, in whom the inheritance of the mines comprised in such lease shall be vested during the time such inheritance shall continue vested respectively. By the third section of the same statute it is provided that where such tenants for life, tenants in dower, or by courtesy, are infants, idiots, or

lunatics, in all such cases the guardians, trustees, or committees of such infants, idiots, or lunatics, may make similar leases with the approbation of the Lord Chancellor of Ireland.

Where proprietors of lands in Ireland have set their lands in fee-farm, or for leases for lives renewable for ever, or for a long term of years, with an exception of mines and minerals, all persons to whom the rent on such fee-farms, or the immediate reversion in fee-simple or fee-tail expectant on such leases, belong, may demise the same for 31 years by the same act: but such leases by mortgagees are declared void against the persons who are entitled to the equity of redemption, unless they join in the lease, or otherwise consent to the making of them. Jointresses are not within the act. Also all leases made under the act will be void, unless the lessees begin effectually to work the same within one year after the commencement of the lease, or shall after the said first year neglect to keep six able workmen therein employed for 150 days in any one year during the term. By the Irish stat. 15 Geo. II. c. 10. coal-mines are declared to be within the last mentioned act: but by the stat. 23 Geo. II. c. 9., the term allowed to be granted as to coal-mines is extended to 41 years.

The second section of the stat. 23 Geo. II. c. 9. provides that the archbishop of Armagh and his successors, may grant similar leases of coal-mines in lands of which they are seised, under a grant of King Charles I., for the benefit of schoolmasters, and demise other mines and minerals in the same lands for terms not exceeding 31 years, with the consent and for the benefit of such schoolmasters, testified by their being parties to such leases.

By s. 3. of the same statute all tenants for life with remainders over as therein mentioned, viz. a husband tenant for life with remainder to his wife for life, with remainder to their first and other sons successively in tail, or a wife tenant for life with remainder to her husband for his life, with remainder to their first and other sons in tail, or a father tenant for life with remainder to his son for life, remainder to the first and other sons of such son in tail, may make leases of coal-mines for forty-one years, in the manner before specified; and by the fourth section such tenants for life may lease other mines and minerals for thirty-one years, according to the conditions of the stat. 10 Geo. I. c. 5.

By the sections 5 and 6 of the same statute the provisions of the stat. 10 Geo. I. c. 5. s. 4. are extended to leases of coal and other mines.

By the act of the 46 Geo. III. c. 71. all persons within these last mentioned statutes may grant leases of lands contiguous to mines, not exceeding fifteen acres for thirty-one years; and the lessees may build smelting houses for the convenience of working such mines.

By the Irish stat. 11 and 12 Geo. III. c. 21. every tenant for life, archbishop, bishop, and body corporate, ecclesiastical or civil, may make leases of any unprofitable bog for the purpose of reclaiming the same; and also of any quantity of land not exceeding half an acre, as a site for a house, or for the purpose of delving for gravel or limestone for manure, next adjoining to such bog, for any term not exceeding sixty-one years, at such rent as shall be agreed upon: provided that no greater quantity of such bog be set to any one person than fifty acres, plantation measure; and provided that from the expiration, surrender, or other determination of such lease, no longer lease of such bog shall be made by any ecclesiastical person or body corporate than is prescribed by the stat. 10 and 11 Ch. I. c. 3.

By an act passed in the last session of parliament, (s) intituled, "An act to enable ecclesiastical persons and others to grant leases of tithes so as to bind their successors," it is enacted that from and after the first of September, 1822, 'all archbishops, bishops, deans, deans and chapters, prebendaries, or other dignitaries ecclesiastical, and all parsons and vicars, chapters, vicars choral and all other ecclesiastical persons and bodies corporate, of whatsoever rank and description, in Ireland, and every lay improPRIATOR or person entitled to any impropriate tithes or portions of tithes, may demise and lease for any term of years not exceeding twenty-one years, to any person or persons seized or possessed of the lands out of which such tithes shall be issuable respectively, having any freehold title or interest, or any interest for a certain term of years, in such lands; or to the person having a reversionary interest of the like nature in such lands expectant on any term not exceeding seven years, or expectant on any freehold not exceeding one life, or to such persons jointly; or to any person or persons

(s) Stat. 3 Geo. IV. c. 125.

having any freehold interest, or any interest for a certain term of years vested and in possession jointly with any person or persons having a reversionary interest immediately expectant upon such interest vested and in possession; all and every or any tithes or portions of tithes, predial or mixed, payable or belonging to such ecclesiastical dignitaries, persons, or bodies corporate respectively by virtue and in right of their ecclesiastical dignities, preferments, or benefices respectively; or payable to any such lay impropiator in the manner, and under the regulations, restrictions, and conditions thereafter specified.

By the second section of the act it appears that the lease must be by indenture; and where made by the incumbent of any benefice, presentative, or donative, the patron, or his committee or guardian, in case he is a minor or lunatic, or the king's attorney-general, if the king be patron, shall be a party consenting thereto, such consent to be signified, before the execution of such indenture, or the counterpart thereof, by indorsement on such indenture and counterpart, subscribed by such patron, committee, guardian, or attorney-general respectively, with the day and year on which such consent shall be signified. The indenture or counterpart is directed to be *signed* and sealed by all the parties thereto; and each part is required to contain a description, with metes and bounds, of the lands leased, subject to the tithes, with a statement of the parish and county; and if in a county at large, then of the barony or half barony, in which such lands lie; and to every such indenture and counterpart it is provided that a map or terre-chart, or ground-plan shall be annexed.

By the same (second) section of the statute it is enacted that the rent reserved shall be the best annual value of such tithes that can be gotten without any fine, premium, or foregift, to be paid to the lessor. And by s. 7. it is provided that if any spiritual dignitary, or person, or body corporate, shall receive for making such lease any fine or consideration other than the rent to be reserved according to the act, in such case the lease shall be absolutely void and of no effect.

It seems to be an omission in the enacting part of this act that it is not mentioned whether the leases made under it are intended to be in possession or reversion: but, from the form of the lease given in the body of the act, it appears to be the intention not to confine such leases to leases in possession strictly, and yet not to

extend them to leases in reversion, or *in futuro*, beyond the first of May, in the same year or next year, then next ensuing. (t)

By s. 3. of the act it is enacted that in the case of leases by any dean or other ecclesiastical dignitary or parson, or incumbent of lower rank, or by any ecclesiastical body corporate, before execution, the consent of the ordinary shall be indorsed on the indenture and counterpart, subscribed with his name, and the date of the day and year on which such consent was given.

By s. 4. it is provided that a memorial of every such lease, with the map or ground-plan annexed, shall be registered with the registrar of the diocese, who, upon the production of the indenture and counterpart, is required to certify, by indorsement upon the same, the registration and date thereof. And every person may inspect the registry, and have a copy of all entries and memorials for a fee of two shillings and sixpence. The fee also for registry is fixed at two shillings and sixpence. And it is provided that the indorsement of the registry shall be good and sufficient evidence of registration, according to the terms of such indorsement. By s. 5. such leases are exempted from stamp duties.

By s. 6. of the (same) statute it is enacted that after registry every such lease shall be good during the whole term demised against the lessors and their successors, as also against the lessees and their assignees: but by s. 8. it is provided that no such lease shall be valid beyond the interest of the tenant in the land.

The rent reserved is by s. 9. made chargeable on the land, and leviable in preference to any other charge, whether rent or parliamentary taxes, or other assessments; and the landlord may appoint the collector of the Grand Jury Cess for the barony in which the lands are situated, or any other person, to levy the same; and the act gives such collector, or other person so appointed, the same powers and authorities to all intents and purposes that collectors of Grand Jury Cess have, with all the same remedies in case of nonpayment, as are prescribed by law with respect to any money to be levied under the presentment of a grand jury. But it is provided by s. 10. that the landlord shall notwithstanding have all such remedies by action as the lessors of any land may have against their lessees; and they may distrain on the land for arrears not exceeding one year's rent.

(t) The form will be given in the Appendix of Precedents.

By s. 11. it is enacted that the owner of the land, the tithes of which are leased to him, shall during the lease, in case he underlets, lease it tithe free; and the occupier may pay the rent of the tithes, and deduct it out of the rent due to his landlord; and the receipt or acquittance from the lessor of the tithes or his collector shall be a discharge to that amount from his own rent.

By s. 12. it is provided that whenever any agreement for a lease of tithes shall be entered into between any person beneficially interested in the land, not being the actual occupier, and any ecclesiastical or other person mentioned in the act, the beneficial owner may serve a notice in writing personally on the occupier, having an interest for any term not exceeding seven years, or for one life only, requiring him to become a party to the lease; and such notice shall contain the particulars of the intended lease with respect to the particular land, and the intended rent; and shall specify the place of residence of such beneficial owner, at which place the answer to such notice is required to be given: and in case the actual occupier shall not within fourteen days after such notice signify his consent in writing; or if after giving his consent he refuse to become a party to the lease, or refuse to sign a counterpart on the same being tendered to him; such person so beneficially interested, having duly executed a counterpart according to the act; and he, his heirs, executors, administrators, or assigns, having paid the rent reserved by such lease, may recover the tithes against the occupier, as if no such lease, had been made. Such person so beneficially interested, after having executed a counterpart in the manner last mentioned, is answerable for the rent to all intents and purposes as if he were the actual occupier. (u) But by s. 14. it is provided that in such cases the occupier shall not be liable to the lessor of the tithes for rent of tithe beyond the amount of rent paid for land occupied by him. By s. 15. it is further enacted that the possession of the land by the occupier, or the receipt of the tithes in the case last mentioned, shall be deemed the possession of the tithes by the lessor during the lease. And by s. 16., if the lessee of the tithes, being a termor, renew his term in the land, he may renew the lease of the tithes within three years previous to the determination of the lease of the tithes by effluxion of time.

(u) s. 13.

The 17th sect. prescribes a form of lease, which will be found in the Appendix of Precedents. And by s. 18. it is enacted that no action shall be brought for the purpose of avoiding any lease made under the act, unless the person intending to bring it give six calendar months' notice in writing at least, before the expiration of some year, reckoning from the commencement of such lease, specifying the cause for which the lease is sought to be avoided.

On the vacating leases by non-residence.

It may be here observed that the English stat. 13 Eliz. c. 20. which avoided leases made by parsons and vicars by reason of non-residence, and its continuing statutes, have been repealed by the stat. 57 Geo. III. c. 99.: but the acts relating to the same point in Ireland are still in force. (x)

By the stat. 10 and 11 Ch. I. c. 2. it is enacted that all leases made by any parson, vicar, or beneficer, having cure of souls shall stand in force for such time only as such parson, &c. shall be resident without absence above eighty days in one year.

The cases which have occurred in England on the stat. 13 Eliz. c. 20. and its continuing statutes, being *in pari materia*, may be referred to as decisions on the stat. 10 and 11 Ch. I. c. 2. in Ireland. (y) Such leases, therefore, are not void *ab initio*, but voidable only from such time as the eighty days are completed. The absence must be voluntary: so that sickness, suspension, or inhibition from the ordinary from serving the cure, or ejection from the parsonage-house, do not constitute non-residence within the statute. (z) A *fortiori*, death cannot be so considered: (a) but

(x) And it must also be considered an omission in the stat. 57 Geo. III. c. 99. that the English statute 1 W. and M. c. 26. s. 6. is not repealed. That statute gives the presentation of the livings of Roman Catholic patrons to the two Universities in certain cases; and non-residence by the parson nominated for sixty days will vacate the benefice.

(y) Gosnall v. Kindlemarsh, Cro. Eliz. 88. Earl of Lincoln v. Hoskins, Cro. Eliz. 490. Rudge v. Thomas, 3 Bulst. 202. Wallis v. Cox, Cro. Eliz. cited 78. 245.

(z) Butler v. Goodall, Cro. Eliz. 590. Collina v. Vaughan, Cro. Eliz. 100. Moor. 448.

(a) Bayly v. Munday, 2 Lev. 61.

the eighty days need not be consecutive ; for, if the incumbent be absent at several times, yet if the eighty days are completed within the year, the lease will be void. (b) Where, (c) however, the parson lived in a contiguous parish, and performed divine service in the parish four days in the week, and duly served the cure thereof, this was held no non-residence so as to avoid a lease by reason of it.

It has been determined on the stat. 13 Eliz. c. 20. that a lease made void by that statute is so void that a stranger, (d) or even the lessor (e) himself, may take advantage of it.

The Irish stat. 6 Geo. I. c. 14. enacts that every deanery, archdeaconry, dignity, and prebend of a cathedral church, the corps of which consists of one or more parishes, or parts of parishes where no vicarage was then, or is at present endowed, shall be so far deemed a benefice having cure of souls, within the said stat. 10 and 11 Ch. I. c. 2. as that no lease or grant of any part of the tithes to any such deanery, archdeaconry, or prebend belonging, shall be good for any longer time than during the incumbency of the lessor. And by the third section it is provided that if any dignitary or prebendary of any cathedral church, or any other ecclesiastical person being rector of any parish where there is a vicarage endowed, shall set the tithes belonging to his dignity, prebend, or rectory, for any longer time than during his incumbency, except where such tithes have been leased for the greater part of thirty years before such lease made, such lease shall be void as to their successors.

By the statute 48 Geo. III. c. 66. s. 5. all contracts and agreements for the lease of houses of residence in Ireland, with their appurtenances, in which any spiritual persons shall be ordered to reside, are declared void ; and the persons continuing to reside in them after notice of such order are subjected to certain penalties mentioned in the act.

By the Irish act 39 Geo. III. c. 14. s. 23. all leases or demises of tithes by any persons who are themselves entitled to such tithes, by virtue of leases by ecclesiastical persons or bodies, rectors, vicars, curates, or impropiators, other than to the

(b) *Mott v. Hales*, Cro. Eliz. 123.

(c) *Shepherd v. Twoulsy*, 1 Bulstr. 749.

111.

(d) *Doe d. Crisp v. Barber*, 2 T. R.

(e) *Frogmorton d. Fleming v. Scott*, 2 East. 467.

actual occupiers of the lands, subject to the payment of the tithes demised, are declared void both at law and in equity.

To prevent the alienations of glebes in Ireland the statute 10 Wm. III. c. 6. s. 7. enacts that no rector, vicar, or other ecclesiastical person having a glebe fit and convenient to be built and improved upon, for the residence of him and his successors, or whereon a mansion house shall be built, or contiguous and convenient to such house, shall alien, set, let, or demise such glebe, or any part thereof, for more than one year in possession, and not in reversion, and all other alienations, leases, or contracts for leases thereof, shall be void.

The stat. 1 Geo. II. c. 15. Irish, prohibits all such ecclesiastical persons as those last mentioned from setting any land granted for glebe according to that and the other acts therein recited; and provides that the officiating curate shall occupy the lands in the absence of such rector, &c. who shall have another benefice.

Of corporations for maintaining the poor.

By the Irish stat. 11 and 12 Geo. III. c. 30. Corporations were established for the purpose of maintaining the poor in every county, county of a city, and county of a town in Ireland, which consist, in counties, of the archbishop or bishop of the diocese, the representatives in parliament and the justices of the peace of such counties; and in counties of cities or counties of towns, of the chief magistrate, sheriffs, and recorder and the representatives in parliament, and justices of the peace, and persons subscribing 20%. or 30%. annually, are also members of such corporations. Each of these corporations is enabled to take by purchase, voluntary grant, or devise, any lands, &c. of inheritance, or for lives, not exceeding the yearly value of 300%. ; and also all such donations of personal property as shall be made to them; and to accept of all leases for years of houses or lands, so as no such lease shall exceed twenty-one years. By s. 3. they are also authorized to take by grant or by devise any quantity of ground within their counties respectively, not exceeding in a city or town two roods plantation measure, or in the

open county twenty acres of the like measure for the sites of houses to be built for the reception of the helpless poor, and for keeping in restraint sturdy beggars and vagabonds.

So by the statute 5 Geo. III. c. 20. Irish, amended by the Irish statute 36 Geo. III. c. 9., similar corporations, consisting of the primate, lord chancellor, bishop of the diocese, and the rector or vicar of the parish, as also of donors of twenty guineas, and annual subscribers of two guineas, are declared capable of purchasing, taking, or receiving, any lands, &c. not exceeding the annual value of 200*l.*, and benefactions to any amount of personal property, for the support of corporations, infirmaries, or hospitals; and by the 47 Geo. III. st. 2. c. 50., the provisions of the last mentioned act are extended to the corporations of cities and towns in Ireland.

By the Irish statute 10 W. III. c. 6. s. 2., amended by the 11 and 12 Geo. III. c. 17. s. 1. and 2. authorizing the purchase and exchange of glebes, a fee-farm lease, or a lease for lives renewable, is a purchase; and a ground rent may be reserved out of the premises so purchased.

Cases on the tenantry act.

The following cases have occurred on the statute 19 and 20 Geo. III. c. 20., commonly called the tenantry act. (*f*)

The demand required by the statute need not be in writing, nor is any precise form prescribed; and yet, if there be several demands, and a formal demand is made, all prior demands are waived; and the time is computed from the time of the formal demand. (*g*) Prior demands, however, will be taken into the account in considering what is a reasonable time, after making a formal demand. And after there have been several demands, if the last is not complied with, the original demand remains the foundation of the right. (*h*) The landlord, in making the demand, is not bound to state the precise sum due, nor to demand from or give notice to every person interested in the subject. (*i*)

(*f*) See *ante*, 232.

(*h*) Lord Mountnorris *v.* White, 2

(*g*) Barret *v.* Burke, 5 Dow. P. C. 1. Dow. P. C. 459.

(*i*) Barret *v.* Burke, *supra*.

The character of a general agent is sufficient to authorize one to demand and to receive fines: but Lord Eldon doubted whether, after a landlord had acquired a right to the forfeiture, the agent could pass from it without a special authority. (*k*)

What shall be deemed a reasonable time must depend on circumstances. Lord Clare (*l*) said, that if he were, on the abstract question, to declare what ought to be deemed a reasonable time, he would say it was no more than what was necessary to give the tenant a full opportunity to ascertain, when the *cestui que vie* died, of computing the amount of the fines due, and for preparing leases, and tendering them for execution. The precise time must depend on the difficulties which he may fairly have to encounter in complying with the demand: but he should strongly incline to determine that if a precise time were limited by the lease for the payment of the renewal fine upon the fall of each life, that the tenant ought to be restricted to the same time after a demand made, unless he has a fair and reasonable excuse for exceeding it. So, if no time was limited, he should be strongly inclined to adopt a rule by analogy to the statutes, giving a remedy by action of ejectment for non-payment of rent; and to determine that the tenant coming into a court of equity for a renewal after six months from a demand, ought to be able to account for his neglect.

In the case of *Keating v. Sparrow* (*m*) a right of renewal was held to be lost, though only one life had dropped, upon the tenant's neglect, for three years, to renew after a demand made. So where (*n*) the demand was made on the 6th October, a tender on the 20th March following was held not to be within a reasonable time, the tenant having had an intimation two years before that payment of the fine was expected, and having neglected to pay it.

In another case, (*o*) however, after notice by the landlord on the 16th December, a tender by the tenant in the October following was held good under the circumstances: and a renewal was

(*k*) Lord Mountnorris *v.* White,
supra.

(*l*) *Deane v. The M. of Waterford*,
cited 1 Scho. and Lefr. 451. in note.
See *Anderson v. Sweet*, 2 Bro. P. C.
430.

(*m*) 1 Ball. and Beatt. 367.

(*n*) *Jackson v. Saunders*, 1 Scho.
and Lefr. 443. 2 Dow. P. C. 437.

(*o*) *Jessop v. King*, 2 Ball. and Beatt.
81. See *Bennett v. Pearson*, 2 Ball.
and Beatt. 189.

decreed on payment of costs. The circumstances were the following: A. seized in fee granted the premises by indenture, together with the timber then standing thereon and to be thereafter planted, to the grandfather of the plaintiff for his life, and for the lives of two other persons; in which lease there was a covenant for perpetual renewal, on payment of the arrears of rent and fine. It appeared that the tenant was just of age, in embarrassed circumstances, and not in possession of the lease. His agent applied to the lessor to see the counterpart, and was refused. On the 16th January a draft had been prepared, and laid before the defendant's solicitor at his desire. It appeared also that the lessor's agent furnished an erroneous account of the arrears of rent and the renewal fine; that a lease had been tendered in February; and the landlord on the 3d July filed a bill for an injunction to restrain the tenant from cutting down timber to pay for the rent and fines. In this case the Lord Chancellor of Ireland said that he entertained a doubt whether the provisions of the tenantry act extended to a demand made by the landlord for an arrear, including rent as well as fines. The impression on the minds of the barons of the exchequer, whom he had consulted, was, that the landlord was entitled to both: but his lordship said his doubts still remained, the express object of the act being to compel the payment of fines without any mention of rent. The opinion, however, of Lord Redesdale in the case of *Barret v. Burke*, (p) seems to agree with the barons of the exchequer mentioned in the last case. The original design of such leases was the better cultivation of inferior lands, and the more easy recovery of rents, which in Ireland was often very difficult. This tenure was particularly important in the disturbed state of Ireland, as the lands were by that means in the hands of tenants acknowledging themselves as lessees. For it often happened that in the course of many years no rent was paid; and if they had been mere fee-farm rents, there would be presumptions against them which would deprive the landlord of his property.

When (q) on the dropping of one of the lives in a lease for three lives, with a covenant for perpetual renewal, repeated applications were made in 1796 and 1798 to the tenant to renew ac-

(p) 5 Dow. P. C. 1.

(q) Lord Mountnorris v. White, 2 Dow. P. C. 459.

cording to the covenant; and he made no offer to renew till 1804 or 1805, when some conversation took place respecting a renewal upon the tenant's relinquishing a suit in equity, which he was carrying on against his landlord; but nothing was done, and afterwards the landlord refused to renew: this case was held not to be taken out of the principle of the cases, in which renewal was refused by the act. The act was confined to cases of simple innocent neglect. A demand without any menace of forfeiture, followed by a neglect for an unreasonable time, was sufficient to preclude the tenant from the benefit of the act. If there had been a consent to waive the forfeiture connected with the relinquishment of the suit in equity, the transaction would have been a new agreement within the statute of frauds.

In the before mentioned case of *Barret v. Burke* (r) a lease for three lives renewable for ever, on payment of a fine on the dropping of each life, had been made in 1713 at 50*l.* rent by A. to B.; B. leased to C. at 100*l.* rent, with a covenant to renew for ever, on the same terms as the original lease; and he also covenanted to renew regularly with A. C. paid his fines regularly, and renewed with B.: but B. never renewed with the representative of A. In 1793, the representative of A. accepted some money from C. towards the discharge of the fines due from B., and made demands for the payment of the whole of the fines by C. which he neglected to comply with. There was a formal demand of the fines made by the representative of A. in 1799 against C., who did nothing for nine months after the demand, and then made an illusory tender, which was not accepted; it was determined that under these circumstances C. had no claim in equity to renew.

We have already observed that in general, in the case of a lease of lives of land in Ireland, renewable for ever, the right is lost if upon notice from the lessor the tenant neglect for a reasonable time to renew. But under particular circumstances that right may, notwithstanding such notice and neglect, still exist and be enforced. In a late case (s) where it appeared that upon the death of the tenant having such right of renewal his nephew, to the exclusion of the heir, obtained an independent lease of the premises in his own name, falsely alleging a devise in his own favour; and the landlord also at the time being in a state of

(r) 2 Dow. P. C. 1.

(s) *Lord Dunboyne v. Mulvihill*, 1 Bligh P. C. 137.

intoxication, it was held that under the particular circumstances of the case the right of renewal was not lost, because it did not appear that the heir, if he had established his right as heir in contravention to the will, might not have compelled a renewal in his favour of the original lease. The case, as it appears in the book cited, is not very easy to be understood. But the facts as they are stated in the decree are these : after the execution of the lease so obtained from the landlord, by the tenant's nephew, it appears that in the year 1718 the heir of the lessee filed a bill in Chancery in Ireland, impeaching the alleged will in favour of the nephew; and, after a variety of proceedings in the cause, they came to an amicable agreement; and by deed dated 3d July 1793, it was declared, that the lease obtained by the nephew was in trust for the heir; and it was agreed that the heir should grant to the nephew a lease for three lives renewable for ever at 142*l.* rent, and 5*l.* renewal fine for each life. The decree further declared that a purchaser for valuable consideration, under the heir of the lessee, was entitled to the benefit of this agreement so far as the same was for the benefit of the heir of the lessee, and that the heir of the landlord was entitled to the benefit which the nephew of the lessee might take under the agreement; and that the lease obtained from the lessor by the nephew should be cancelled, as well as another lease which had been executed by the heir of the lessee to the nephew in consequence of the agreement last mentioned.

On the statutes relating to plantations.

In Ireland it is provided by the stat. 31 Geo. III. c. 40. that no person holding any lands by lease for one or more lives, or for years, or at will or sufferance, shall cut down, grub out, lop, or top any tree, wood, or underwood growing upon such lands, under colour of estovers, or of housebote, ploughbote, haybote, cartbote, or other bote, or under any other pretence, unless such person shall be authorized thereto by covenant in the lease, under which the said lands shall be held, or unless such person shall have the consent of the owner thereof under his hand and seal, upon pain of being subject to the penalties against persons

wilfully cutting, or damaging trees, without the consent of the owner thereof first had. But by s. 5. it is provided that this act shall not extend to leases renewable for ever, nor to any trees planted and registered according to any former law.

By the stat. 5 Geo. III. c. 17. Ir., which is one of the acts for encouraging the planting of timber trees, it is provided that if any tenant for life or lives, by lease or otherwise impeachable of waste, or any tenant for years exceeding twelve years unexpired, shall plant any timber trees, such tenant shall during the term be entitled to botes of such trees by him planted, and at the expiration of the term to the said trees, or the value thereof, according to the directions therein mentioned. But by s. 3. a certificate under the hand of the tenant of the planting of such trees is required to be registered within six months after such planting, with the clerk of the peace of the county where the planting is made. The certificate should contain the number and kind of trees planted, their height and years' growth at the time of planting, and a clear description of the places and manner wherein they shall be planted. The certificate is to be kept on a separate file amongst the records of the county, and entered in an alphabetical book by the denomination of the land in the said county; and such certificate, or a copy thereof attested by the acting clerk of the peace, shall be evidence of notice of such plantation in all courts: to which book and certificate all persons may resort during each quarter session without fee.

By s. 4. of the same statute, where the term of the tenant is uncertain, such tenant paying the rent, and performing the other covenants in the lease, may for one year after the expiration of his term, enter upon the land, and cut in due season all the trees so planted, and registered, and manufacture the same on the lands for one year after such felling, making reasonable satisfaction for the trespass committed by felling, coaling, or manufacturing the same. And where the expiration of the term is certain, the tenant during the last year of his term may do the same. But by s. 5. any person entitled to the reversion and inheritance mediately or immediately, shall be at liberty during the last year, save one, of the term, when the expiration of the term is certain, or six calendar months after a term for life, or any uncertain contingency, to apply by petition to the justices of the peace at their quarter session, and set forth his title and intention, giving twen-

ty-one days' notice ; and upon entering into a recognizance with sufficient sureties, conditioned to pay such tenant such sums as shall be adjudged to be the value of the said trees, according to the rules of this act, the property of such trees shall vest in the petitioner from the time of such notice ; and the parties shall at the same or ensuing session by a jury of freeholders of the county ascertain the value of the trees when felled, over and above the expense of felling, and the compensation to be made, if any such be necessary ; which, with the record of such judgment and recognizance, shall be by the justices at the instance of the party interested certified into Chancery ; and execution shall issue thereon, as usual, upon recognizances taken before a master of the court. But if such petitioner shall fail to give such security, at such session, according to such notice, the property of such trees shall remain in the tenant. By s. 6. if more than one person entitled in reversion, shall petition, the immediate reversioner shall be preferred to one more remote. By s. 8. where the reversion belongs to a minor, and the court of Chancery shall adjudge it to be for his benefit that the trees shall be purchased, the guardian shall be allowed for what he pays, and expenses for the purchase. And if the person purchasing such trees shall be tenant for life or in tail, impeachable for waste, such purchaser shall stand in the place of such planter ; and such trees if not felled by him, during the subsistence of his title, shall be felled and valued according to the rates of this act.

In order to ascertain what compensation shall be made by any tenant entitled by the act to fell trees after the expiration of his term, such tenant may by s. 9. petition the justices giving the reversioner like notice ; and on the tenant's giving like security, by recognizance, the court shall by a jury ascertain the damages, and the like remedy shall be against the buyer as by s. 5. But by s. 7. the act shall not extend to leases made by the guardians of minors, or custodees of lunatics or idiots, or to any persons in possession as creditors by mortgage, *custodiam*, or *elegit*, or otherwise, or deriving under such only, or to any tenant evicted for non-payment of rent.

This act moreover enacts that tenants for lives renewable for ever, paying the rents and performing the other covenants in their leases, shall not be impeachable for waste in timber trees and woods, which they should thereafter plant ; any covenant in leases

or settlements theretofore made, law, or usage to the contrary notwithstanding. And by s. 2. from the time of any tenant for life or lives by lease or otherwise, or any tenant for years, exceeding twelve years unexpired, shall plant willow, osier, or willows, the sole property of such during the continuance of the term shall vest in the tenant, and he may cut and sell the same.

By the 17 and 18 Geo. III. c. 35. s. 1. Irish, the surrender of any lease for years to any body corporate, for the purpose of taking a new lease, shall not be considered as the expiration of the term, within the stat. 5 Geo. III. c. 17. Ir.

The subsequent stat. 23 and 24 Geo. III. c. 39., intituled "an act for amending the laws for the encouragement of planting timber trees," after reciting that the former laws had proved ineffectual, enacts that tenants for life or lives, or years as before mentioned, who shall plant timber trees, shall be entitled to cut, sell, and dispose of the same at any time during the term; provided that such tenant within twelve calendar months after such planting lodge with the clerk of the peace an affidavit sworn before a justice in the form specified by the act.

By s. 3. of the same act, if any tenant as aforesaid shall enclose any coppice wood, which he was not bound by his lease to preserve, and which has not been enclosed or preserved from cattle for five years preceding, the said tenant shall have power to cut, sell, or dispose of the trees, which shall grow from the said coppice during his term, leaving one timber tree on every square perch. By s. 4. he must give twelve calendar months' notice of his intention to enclose at the quarter session for the county in the form prescribed by the act; and by s. 5., within six calendar months after the said inclosure, he must lodge with the clerk of the peace a map of the same with an affidavit in the form given by the act. The sixth section provides that by application to the justices the truth of the registry may be tried by a jury, and avoided if false. The seventh section enables the tenant to sell his right to the reversioner, mediate or immediate; the sale to be made by writing signed by the tenant, and attested by two witnesses, and an attested copy thereof to be lodged with the clerk of the peace of the county. By s. 9., when the term of the tenant is uncertain, the tenant shall have liberty one year after the expiration of the term to enter and cut and dispose of the same trees, making such

compensation in damages as shall be awarded by two of the neighbours appointed by the next residing justice of the peace, by an order under his hand, which two neighbours, if they differ, shall call in a third. By s. 10. the reversioner may at any time within six calendar months serve a notice in writing to the tenant to desist from cutting; and by application to the justices at quarter sessions, and proof of service of notice 21 days before the sessions, oblige the tenants to sell at the value to be ascertained by a jury empanelled for that purpose; and if there should be more than one claimant, the more remote inheritor is to be preferred to the more immediate. S. 11. provides that the tenant may sell by private bargain to any reversioner, such sale to be registered with the clerk of the peace within six months. And by s. 12. the surrender of any lease for years or for lives to any body corporate for the purpose of renewal shall not be considered an expiration of the term as far as respects the act: but every renewal shall be considered as the continuance of the original term; and the tenant shall enjoy all benefit of planting given by the act as fully as if the additional term or lives had been contained in the original lease. By s. 21. it is provided that the act shall not extend to trees planted pursuant to any covenant in the lease, nor affect any such covenant; nor shall it extend to tenants evicted for non-payment of rent.

By stat. 9 Geo. II. c. 7. the executors or administrators of tenants for life or in tail, with remainder over, are entitled to a moiety of timber trees planted by them (timber planted for shelter or ornament excepted): it should seem therefore that in such cases a lessor, tenant for life, might except a moiety of the trees so planted by them.

The Irish stat. 40 Geo. III. c. 23., after reciting that agistment tithe had not been demanded for more than 60 years then last past, enacts that no claim shall be allowed for the tithe of agistment for dry and barren cattle: but nothing therein exempts from the payment of tithe any kind of cattle in any parish or part of this kingdom, in which tithe now is, or hath been, usually paid within the last 10 years. No person shall be exempt who shall not give notice in writing to the rector, &c. or his agent in the parish in which the land lies, of the time from which he claims exemption

at least six calendar months before the commencement of such period, specifying in such notice the quantity and quality of the land, together with a map or survey, verified by the oaths of two surveyors, which any magistrate of the county may administer; one surveyor to be named by the occupier, and the other by the parson, &c., which notice and survey shall be registered by the parson, &c., in the registry of the diocese; and such notice or survey, or an attested copy by the registrar, shall be conclusive evidence of the quantity and situation of the land, and of the time from which the exemption commenced. By s. 4., in case the person claiming any exemption from tithes, under this act, shall by notice duly served require any parson, &c. to appoint a surveyor on his part, and such parson, &c. shall for one month after such service refuse or neglect to appoint a surveyor, then such map verified by the surveyor appointed by the person claiming exemption, shall be sufficient.

In order to prevent the pernicious practice of burning land, the same statute in the fifth section provides that no land, the soil or surface of which shall be burned, shall be considered as having been improved within the meaning of the act 5 Geo. II. c. 9., (1) nor shall it be discharged from tithe by virtue of that act, unless the consent of the proprietor of such land under his hand and seal be obtained before any part be burned.

On the construction of patents.

The Irish stat. 33 Hen. VIII. st. 2. c. 4., that if the crown's patentee attempt any wilful war or invasion, or transgress in any part of his duty of allegiance, which the law declares to be treason, or do not perform the covenants and parts comprised within his letters patent, they shall forfeit all their right, interest, or estate. And by s. 2. all future patents are directed to contain words to this effect.

(1) See *ante*, 432.

On the registry of deeds.

THE BANKER'S ACT.

By the Irish stat. 32 Geo. II. c. 14. s. 2. all deeds by bankers and their agents, whereby any part of their real estate or leasehold interest, or any mortgage upon leasehold estate, shall be granted, released, sold, demised, or affected, otherwise than leases not exceeding three lives, or thirty-one years, to be made by such bankers at the full improved rent, without fine, are directed to be registered within one calendar month after execution; and, if executed out of the kingdom, then within three calendar months; and for want of such registry every such deed shall be fraudulent and void, against creditors, though made for valuable consideration.

On registry by ecclesiastical persons.

On the perfection of any leases in pursuance of the Irish stat. 10 and 11 Ch. I. c. 3. by archbishops and others mentioned in that act, the respective lessors are directed to file counterparts of such leases in their respective registries for the benefit of their successors; for which the registrar shall have from every such lessee the fee of twenty shillings, to be recovered on refusal by civil bill. And on payment of the fee the lessee shall suffer no loss or penalty for not entering such counterparts in the respective register books of the said archbishops and bishops, &c., nor shall the lease be avoided for the default thereof.

Of debtors to the crown.

By the stat. 25 Geo. III. c. 53. Irish, a copy of the *scire facias* against the heir and the tenants of any deceased debtor to the king should be published in the Dublin Gazette, and in the other Dublin papers, as well as in the public newspaper of the county, to the sheriff of which the writ is directed. And by s. 5. every sheriff to whom such writ of *scire facias* shall be directed

shall three times within six weeks from the delivery thereof cause a copy of such writ to be affixed upon the church of the parish where the heir of the king's debtor shall reside within his county, or shall have resided within six months.

Where accountants to the crown are bound in a penalty by bond or recognizance; then, if they are indebted to the king within the penalty, *scire facias quare executionem non* issues in the first instance: but where there is no such bond, or the accountant is indebted beyond the penalty, a commission must issue to ascertain the debt. And it is provided by s. 9. of the same stat. (25 Geo. III. Irish) that after the debt is ascertained, the attorney-general shall file an information in the Exchequer in the nature of an English bill for a sale of the land; and by s. 10. the claims of strangers paramount to the claim of the crown are to be put in on oath by motion; and by s. 11., in case of a decree in favour of the crown, such decree shall be carried into execution in like manner and by the same officers as in the case of decrees upon bills for foreclosure of mortgages, by subject against subject. By s. 12. these proceedings are limited to six years after the debtor's death.

By the 41 Geo. III. c. 90. the record of the king's debt in England may be transmitted to Ireland, and process issue thereon; and the ss. 3 and 4. provide *è converso* for the recovery in England of debts due to the king in right of the crown in Ireland.

On writs of execution.

By the Irish stat. 6 Ann. c. 7. s. 6. it is provided that the sheriff shall be liable to the party grieved in 20*l.* or treble damages at the election of the plaintiff, to be recovered in any court of record, if (among other things) he shall not hold an inquiry upon a writ of *elegit*, *extendi facias*, or *capias utlagatum*, within ten days after the delivery or tender of it to him; or if he shall hold the inquiry at any place save the chief town in the county, or such other place as shall be agreed upon between the parties; or without giving notice in writing eight days before the execution thereof to the said party of the time and place of holding such inquiry. And if upon such inquiry any lease for years be found, before the sale

thereof, the sheriff, before whom such inquiry shall be so held, shall after such inquiry give notice in writing under his hand that such lease has been found; and therein name the parties both plaintiff and defendants, and the debt, interest, and costs demanded, and the lands and tenements found thereby; and affix the said notice in the most public place in the shiretown of the county, town, or city wherein such leasehold lands are situate by the space of eight days before any sale shall be made by such sheriff of such lease.

On distress by ecclesiastical persons.

By the Irish statute 11 Geo. II. c. 15. s. 3. every archbishop or bishop, translated from one see to another, to whom any rent shall be due at his translation, and in case of his decease his executors or administrators, shall have an action of debt for all such arrears due at the time of such translation. He and his executors or administrators may also distrain so long as the lands continue in the seisin or possession of the tenant owing the arrears, and those claiming under him: but these remedies are limited to two years after such translation.

On illegal rescous.

In Ireland the legislature has made an illegal rescous liable to severe penalties. By the statute 4 Geo. I. c. 5. s. 1. the person rescuing may be fined by the court before whom he is convicted of so doing; and, in case of his not paying the fine to the sheriff of the county within one month, he may be conveyed by the sheriff to the house of correction or workhouse, and there kept to hard labour for any time not less than three months, and not exceeding six, according to the discretion of the judges or justices before whom he was convicted. And by sect. 2. the landlord may bring his ejectment, and recover the premises, as if no distress had been found: and in case the tenant shall suffer judgment to pass against the casual ejector, or after a verdict against

him; then if such tenant shall not pay all rent and arrear with full costs, within six calendar months after judgment had, such lessee or his assignees are barred from all relief in law or equity other than by writ of error, and the premises discharged of the lease.

By the statute 8 Geo. I. c. 2., Irish, it is provided that if any distress lawfully taken shall be rescued, on oath thereof being made within fourteen days after, before any justice of the peace of the county, such justice may by warrant order one or more constables of the said county to go with and assist the landlord or his bailiff to distrain again and to secure and convey the distress so taken to some lawful pound. So also by the same statute, if oath is made in the same manner that any corn or hay lawfully distrained is in great danger of being rescued, the justice may appoint a sufficient number of persons to protect the distress until sold, and delivered in due course of law; and the statute regulates the wages to be given to such persons.

By the Irish statute 29 Geo. II. c. 12. all bonds, contracts, and agreements, between tenants to obstruct distress are declared illegal and void; and a penalty of 5*l.* is imposed for writing threatening letters, or combining for the same end.

On replevin bonds.

The statute 11 Geo. II. c. 19. s. 23. does not apply to Ireland: but a statute of a similar nature seems to have been passed before its enactment, namely the Irish statute 8 Geo. I. c. 6. s. 5. by which all seneschals, stewards, judges, or officers of inferior courts, having power to grant replevins, are required to take in their names from the plaintiffs in replevin a bond with sufficient sureties for prosecuting the suit, and also for returning the goods so replevied, if a return should be awarded, before they make deliverance of the distresses. This statute was in effect nothing more than introducing by legislative enactment the practice which prevailed in England before the statute 11 Geo. II. c. 19.

On appraisement of distresses.

By the statute 18 Edw. IV. c. 1., Irish, as explained by the Irish statute 10 and 11 Cha. I. c. 7. s. 2., the appraisement of distresses is directed to be within eight days after the taking, by four or more persons of the parish, as was used to be done by four persons of the lordship, between very lord and very tenant; the oath to be administered by the party distraining, or by their seneschals, bailiffs, or receivers. And if he from whom it is taken do not come within eight days after the presentment, and pay or make agreement for his duty, the distress may be taken at the appraisement for rent and damages; the surplus, if any, to be restored; and, if deficient, the tenant may be distrained again.

By the Irish statute 8 Geo. I. c. 2. the appraisement may be by three persons of the barony where the distress is taken; and the landlord, his steward, bailiff, agent or receiver, may administer the oath; and such appraisement shall be as valid as if made in pursuance of the former law.

By the Irish statute 25 Geo. II. c. 13. s. 5. all distresses for rent or arrears of rent, unless redeemed within eight days, may be sold by public sale to the highest and fairest bidders at such times, and such convenient places as the person distraining, his agent or bailiff, shall for that purpose appoint; first causing notice in writing of the place and time intended for such sale to be posted up six days previous to the time of such sale in the next market town, at the usual place for posting up public notices. And the price for which such distresses shall be *bona fide* then and there sold, shall be deemed as between all the parties aforesaid, and all persons deriving under them respectively, to be the full value of such distress; and such value shall not be afterwards questioned in any court of law or equity. And in case such distress shall be sold for more than is owing to the persons for whose benefit it shall be taken, the overplus, after deducting all the necessary expenses attending the taking and selling the distress, shall be paid over to the persons from whom the distress was taken.

On the ejectment statutes.

By the Irish statute 4 Geo. I. c. 5. s. 3. it was provided that as often as more than one year's rent should be in arrear to any landlord, though there should be sufficient distress on the land to answer the said rent in arrear, such landlord might serve a summons in ejectment for recovery of the demised premises; and in case of judgment by default of appearance, or nonsuit for not confessing lease, entry, and ouster, if it shall appear to the court by the affidavit of such landlord, or his agent or receiver, or shall appear on the trial, in case the defendant appears, that more than one year's rent was due before the said summons was served, such landlord or his lessee in ejectment shall recover judgment, and have execution thereon; and the jury that shall try such cause, in case it shall be before a jury, and if not, the judge before whom such judgment shall be given, shall ascertain the sum due and in arrear. And in case the lessees or their assignees, or other persons deriving under the said lease, shall suffer judgment to be had on such ejectment, and execution to be executed thereon without paying on demand the rent so ascertained to be in arrear with full costs, which the officer is empowered to tax; or depositing the same in a court of equity on filing a bill within six months after execution executed; the lessees or their assignees, and all other persons deriving under the said lease, shall be barred and foreclosed of all relief in law or equity other than by writ of error for reversal of such judgment in case the same shall be erroneous; and the landlord shall from thenceforth hold the said demised premises discharged of the said lease. If any bill in equity is filed within the provision of the act, the proceedings on it and the relief given are directed to be according to the stat, 11 Ann. c. 2. s. 4. (1) And if the verdict in ejectment shall pass for the defendant, or the plaintiffs shall be nonsuited for any cause except the defendants not confessing lease, entry, and ouster, the defendant shall have his full costs. By the 5th section the rights of mortgagees not in possession are saved. There is likewise a saving of the rights of infants, femmes covert, and persons of unsound mind: but this saving is repealed by the statute 56 Geo. III. c. 88. which includes also all such savings in all the intermediate statutes (v) of the same nature.

(1) *Ante.* 753.(v) *See post.*, 857.

By the stat. 8 Geo. I. c. 2. s. 1. it is provided that notice in writing shall be given to the person on whom the summons in ejectment shall be served according to the stat. 4 Geo. I. c. 5. that the ejectment is brought for nonpayment of rent; and if any person after affidavit made of such service makes defence in such ejectment, and shall appear on the trial, and confess lease, entry, and ouster, and the plaintiff shall then make due proof of the perfection of the counterpart of the lease by which such rent is reserved, and that such landlord or those under whom he derives title have been in possession of such lands for three years before service of such ejectment, or shall shew any sufficient title to the premises; and it shall appear in evidence at the trial that one whole year's rent or more is due to the said landlord, the plaintiff shall have judgment in such ejectment, in such manner and under such proviso as by the former acts of the 11 Ann. c. 2., and 4 Geo. I. c. 5. It is also provided that no privilege of parliament shall be allowed in any ejectment for the recovery of lands for the non-payment of rent, nor in any suit for holding over under the statute 11 Ann. c. 2., nor in any suit for an injunction to restrain waste. (u)

Notwithstanding any writ of error to reverse any judgment obtained in any ejectment brought by virtue of this act, or the act of the 11 Anne, execution shall issue and be executed, unless the party that brings the writ of error shall within four days after such a writ of error shall be tendered pay into the court, where such judgment was obtained, all such sums as appear to be due for the rent of the lands for which such ejectment was brought, together with full costs of suit: which sums the judges of the court where the judgment was obtained shall order to be paid over to the lessor in ejectment, upon his giving security to repay the same, in case the said judgment shall be reversed. (x)

By the 4th section of the same stat. 8 Geo. I. c. 2., if the premises have been mortgaged for a valuable consideration, the lessee and the mortgagee, and their assignees, shall be served with summonses in the ejectment; and if the mortgagee or his assignee shall not, within nine months after execution executed, pay or tender to the landlord the rent, arrear, and costs, the

(u) Irish stat. 8 Geo. I. c. 2. s. 2.

(x) Stat. 8 Geo. I. c. 2. s. 3.

mortgagee or his assignee shall be barred of relief, both in law and equity, on account of the said mortgage. And by the fifth section every mortgage of a lease, and every assignment of such mortgage, is directed to be registered within six calendar months after perfection thereof; and in default thereof the landlord may proceed, and obtain judgment and execution, although such mortgagee or assignee be not served with a summons, in such manner as if he had been served. By the seventh section it is provided that in all ejectments for non-payment of rent notices shall be given in writing that such ejectments are brought for non-payment of rent.

By the Irish stat. 5 Geo. II. c. 4. where one whole year's rent is in arrear for any lands demised for lives or years determinable on lives, by leases, minutes, or contracts in writing, containing an actual demise, wherein no clause of re-entry has been reserved, the landlord may bring ejectment, and recover the possession in the same way as if a clause of re-entry had been specially reserved. And every lessor recovering in ejectments for non-payment of rent, and obtaining execution of judgment, shall have the same remedy for all arrears to the time of the execution executed as such lessors might have had if no such ejectment had been brought.

The Irish stat. 25 Geo. II. c. 13. s. 2. further provides that where any article, minute, or contract in writing, shall be made of any lands, &c. and the rent payable be ascertained by such article, &c., and the person to whom such article is made, or any deriving under him, shall enjoy the land, and one whole year's rent is in arrear, the landlord may proceed in ejectment; and recover as if the said article contained an actual demise, and as if a clause of re-entry had been specified therein. And by s. 3. on any trial in ejectment for non-payment of rent, in pursuance of this act where it shall be necessary to produce the counterpart, if it shall appear that no counterpart was perfected, or if perfected lost, or so mislaid that it cannot be produced at the trial, then the original article, or a copy thereof, or a copy of the counterpart shall be deemed good evidence.

Since a doubt had been entertained under the Irish stat. 4 Geo. I. c. 5. whether the rent ought not to be demanded, the Irish stat. 15 and 16 Geo. III. c. 27. s. 1. enacts that no eviction of any lessee or other person deriving under any lease by virtue

of any such ejectment, shall be impeached for want of a demand; nor shall it be necessary to make such demand. The s. 3. also removes a doubt as to tithes; and declares that such ejectments may be maintained for non-payment of rent on leases of tithes, great or small.

The Irish stat. 5 Geo. I. c. 4. s. 2. enacts that every lessor recovering in such ejectments shall have the same remedies for all arrears, to the time of execution executed, as he might have had against the lessee or his assignee if no such ejectment had been brought.

By the late stat. 56 Geo. III. c. 88. it is enacted that in Ireland if any tenant, who shall be in arrear for one half year's rent, shall desert the premises, or leave the same uncultivated, or carry off the stock and crop, or otherwise abandon the same, so as no sufficient distress may be had to countervail the arrears of rent then due for the same; it shall be lawful for the landlord to proceed by way of civil bill before the recorder of Dublin, if the premises are in the county of the city of Dublin, or before the chairman of the session of the peace for the county of Dublin, if they are in the county of Dublin, and before the assistant barrister of any other county, in case the tenement shall be in any other county. And thereupon two or more justices of the peace, having no interest in the demised premises, at the request of the landlord or his bailiff may go and view the same between ten and four in the day; and, having fully ascertained the fact, they may certify the same: which certificate shall be conclusive evidence of the facts therein contained, till disproved either then or on appeal from such civil bill. And thereupon the landlord may serve a process upon such civil bill, together with a copy of the certificate on the tenant, if he can be found; and, if not, then he may affix such process and a copy of the certificate on some notorious part of the premises, and also upon the door of the parish church, if the same be in repair; and also upon the door of the Roman Catholic chapel, if any within the parish, summoning the tenant to appear on a day certain to answer the said bill. And on the hearing such assistant barrister, chairman, or recorder, are empowered to decree the landlord to be put in possession of the premises. By the fifth section of the same act the process of summons directed to be served on the tenant must be served thirty clear days at the least previous to the day therein named. This act as to matters

of form, and the regulation of fees, has been explained and amended by the stat. 58 Geo. III. c. 39.

By the stat. 1 Geo. IV. c. 41. where the rent is less than 50*l.* per annum, or amounts to 50*l.* per annum; (*y*) and the tenant's interest is determined; if delivery of possession be withheld after notice, the possession may be decreed in the same manner by civil bill as in the case just mentioned.

Where the rent does not exceed 50*l.*, and a year's rent is due, the landlord may proceed by civil bill against the tenant, and also against the persons, if any, in actual possession, and also against persons having interest for valuable consideration, where the deeds or instruments creating such interest have been duly registered; and possession may be decreed in like manner. An appeal however lies within the time allowed for appeals from the civil bill process; and the lessee may tender rent and costs to redeem. (*x*)

The 14th section of the stat. 56 Geo. III. c. 88. s. 14. repeals the saving clauses in the stat. Ir. 11 Ann., 4 Geo. I., 8 Geo. I., 5 Geo. II., and 25 Geo. II., in favour of infants, *femes covert*, and insane persons.

By the stat. 58 Geo. III. c. 39. s. 5. the assistant barrister, or other judge being a landlord in his own jurisdiction, may proceed by way of civil bill before the judge of assize; and an appeal lies from the decree of such judge of assize to the next going judge of assize.

By the stat. 1 Geo. IV. c. 41. s. 2., where the tenant in Ireland is not resident, delivery of notice or process to such tenant in person, or at the dwellinghouse of such tenant, to his wife, or to any child or servant of such tenant, being of the age of sixteen or upwards, shall be deemed good service.

Under the ejectment statutes in Ireland the permitting a tenant to retain possession, and expend money in building with the knowledge of the landlord after an eviction for nonpayment of rent, is waiver of the forfeiture. (*a*)

After judgment and execution on ejectment for non-payment of rent a bill does not lie at the suit of the tenant for an account

(*y*) See stat. 56 Geo. III. c. 89. 58 Stat. 1 Geo. IV. c. 39.
Geo. III. c. 39.

(*a*) *Hume v. Kent*, 1 Ball. & Beatt.

(*z*) Stat. 56 Geo. II. c. 88. s. 3. 554.

and to be restored to the possession, on payment of what shall be due, without bringing the rent into court: but this is supposing that the question is merely as to the quantum of rent. But if the defence is merely an equitable one, and such as could not be set up at law, it seems that such a bill might be brought without doing so; (b) as for instance, where (c) there have been various dealings between the landlord and tenant, so as to produce an account too complicated to be taken at law.

Where (d) a landlord in 1781 by ejectment for nonpayment of rent entered upon the possession of the widow of the tenant for life of a lease for lives, renewable for ever, remainder to her children, who were infants; and the children in 1806, long after they came of age, and after the lessor had been in undisputed possession for twenty-five years, filed their bill for relief: The House of Lords held that there was no ground for interference in this case; and this was before the stat. 56 Geo. III., which takes away the saving clauses in favour of infants. (e)

In Ireland it is usual for the lessee, after he has been three years in possession, and is disturbed, to file a bill called a possessory bill for an injunction to quiet him in his possession till evicted by due course of law: and this is founded on the equity of the statutes made against forcible entries. But all bills of this kind must allege, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership is in any other person. And it is a rule in these bills not to meddle with the title, that being properly cognizable at law. (f) But where the landlord brings this species of bill against his tenant for holding over, the landlord need not make an affidavit of a three years' possession, and a title still in being; for in this case the bill is founded on the fraud committed by the tenant

(b) *O'Mahony v. Dickson*, 2 Scho. Scho. and Lefr. 679.
and Lefr. 400.

(c) *O'Connor v. Spaight*, 1 Scho. 4 Bro. P. C. 398. Toml. Ed. Luttrell
and Lefr. 305. v. Lord Irnham, 7 Bro. P. C. 388.

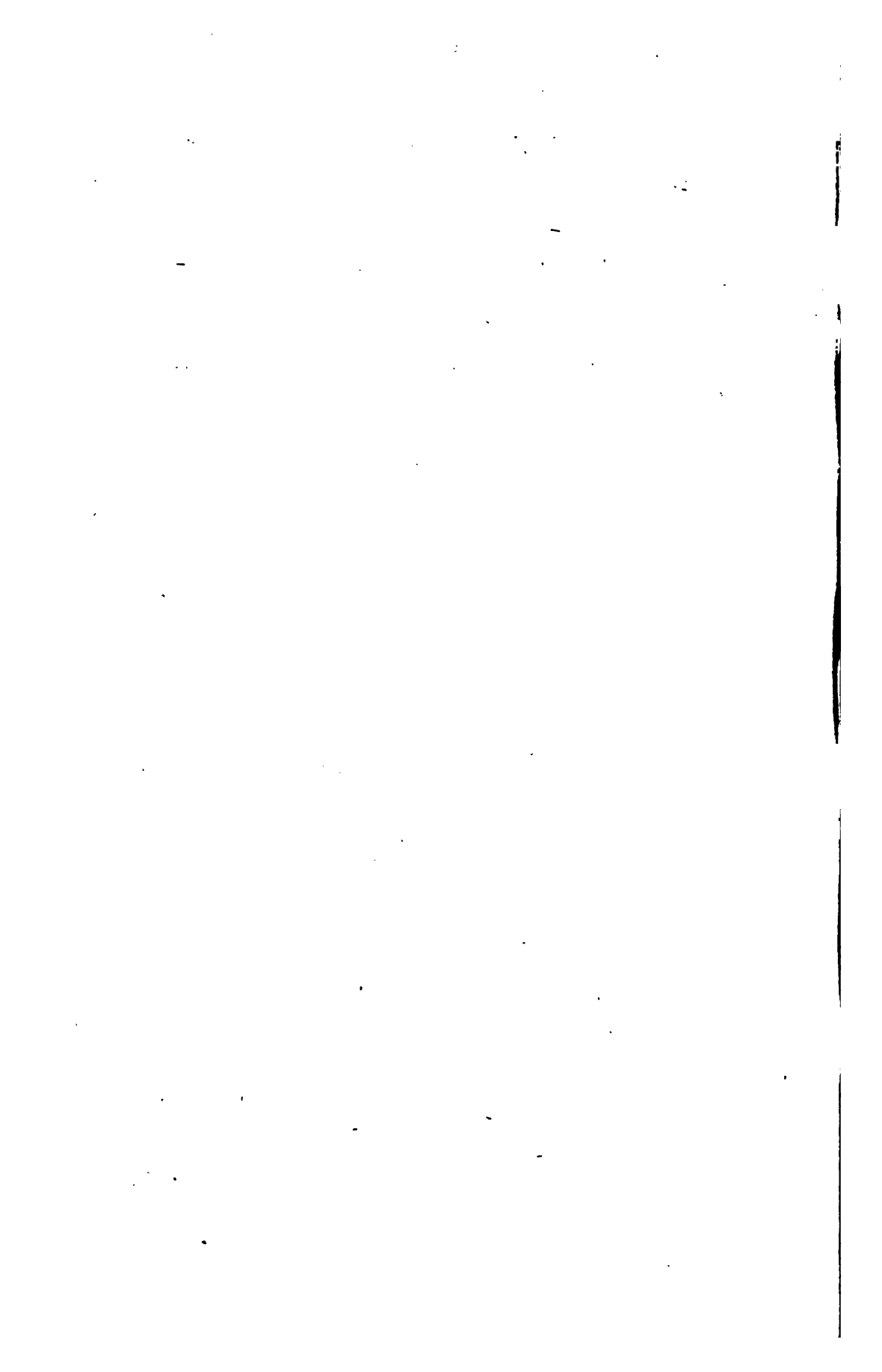
(d) *Baker v. Morgan*, 2 Dow. P. C. Toml. Howard's Treatise on the
526. Practice of the Exchequer in Ire-

(e) *O'Connors v. Lord Bandon*, 2 land, 304.

on the confidence reposed in him by the landlord, in which kind of cases courts of equity have always exercised an original jurisdiction.

By the Irish stat. 26 Geo. III. c. 24. s. 64. persons taking or keeping forcible possession, or resisting process for giving possession, are guilty of felony, and are liable to transportation for seven years.

By the previous stat. 25 Geo. II. c. 12. s. 4. it is provided that persons having right shall be deemed in actual possession from the time of resisting the process, and entitled to the profits from the time of the judgment; and the persons keeping possession shall forfeit the double value of the rent to the person entitled.



APPENDIX

OF

PRECEDENTS.

-
- I. *Of agreements.*
 - II. *Of leases.*
 - III. *Of assignments.*
 - IV. *Of surrenders.*
-

I. PRECEDENTS OF AGREEMENTS.

1. *Articles of agreement under seal for the lease of a dwelling-house (to be void in case the intended tenant should die before the commencement of the term.)*

Articles of agreement between A. B. of, &c. of the one part, and C. D. of, &c. of the other part.

Whereas the said A. B. is seised in fee of, or otherwise entitled to a certain messuage or dwelling-house, with the appurtenants situate, &c. Now the said A. B. doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, that he the said A. B., his heirs or assigns, shall and will before Michaelmas day next ensuing the date of these presents, put the said messuage or dwelling-house and premises in good and sufficient repair; and also shall and will find all locks needful for the doors in the said messuage or dwelling-house and premises, and a fire grate for the kitchen. And also shall and will make a good and sufficient lease by indenture of the said premises to the said C. D. for the term of years, to commence from the said feast of St. Michael on next ensuing the date of these presents, to hold the same at and under the yearly rent of *l.* payable quarterly at the four usual feasts in every year during the said term: the said A. B. in consideration thereof agreeing hereby to indemnify and discharge the said C. D., his executors, administrators and assigns, of and from all quit-rents, ground-rents, and other incumbrances on the said premises. And it is hereby agreed by and between the said parties hereto, that in the said intended

with a covenant in the said indenture of lease to be contained on the part of the said A. B., his heirs and assigns, that he and they shall and will permit and suffer the said lessee, his executors, administrators, and assigns, to have, hold, and quietly enjoy the said premises from year to year, or for such longer successive terms as the custom of the said manor may permit, until the full end and term of years hereinbefore agreed to be granted as aforesaid. (a)

Signed A. B.
 C. D.

Signed in the presence of
 E. F.
 G. H.

4. *Memorandum of agreement for the sale of leasehold property.*

Memorandum, &c.

The said A. B. doth hereby agree to sell, and the said C. D. to purchase, at and for the price or sum of £. of lawful money of Great Britain and Ireland, current in England, all the estate and interest of him the said A. B., of and in the several messuages, lands, tenements, and hereditaments, now held by the said A. B., for and during the life (or "lives") of, &c. (or "for the term of years," *as the case may be*) by virtue of a lease thereof, bearing date the day of , and granted by X. Y. of, &c. And the said A. B. doth hereby promise and agree, to deliver at his own expense to the said C. D., his executors or administrators, a full and satisfactory abstract of title, within one calendar month next ensuing the date of these presents, but so as he shall not be compelled to produce the title of the said X. Y., the original lessor of the said hereditaments and premises. And the said A. B. doth hereby promise and agree that he will on or before the day of now next ensuing the date hereof, upon receiving from the said C. D., his executors or administrators, the said sum of £. of such lawful money as aforesaid, make, execute, and deliver proper conveyances and assurances of the said premises to the said C. D., his executors or administrators, at the costs and charges nevertheless of the said C. D., his executors and administrators. And it is hereby agreed and declared that on the payment of the said sum of £. the said C. D., his executors, administrators, and assigns, shall be entitled to the rents and profits of the said lands and premises, from the day of now last past, up to which time all taxes, rates, and assessments, payable in respect of the said premises, have been paid by the said A. B.

Signed A. B.
 C. D.

Signed in the presence of
 E. F.
 G. H.

(a) Unusual covenants or agreements should be specially stipulated for.
See ante.

II. PRECEDENTS OF LEASES.

I. INDENTURE OF FEOFFMENT.

This Indenture, &c.

Between A. B. of &c. of the first part, C. D. of &c. of the second part, and E. F. of &c., an attorney appointed on behalf of the said A. B., to deliver seisin of the premises hereinafter mentioned, of the third part.

Whereas the said A. B. hath contracted with the said C. D. to grant to him by feoffment a lease, for the lives of certain persons hereinafter named, of the lands, tenements, and hereditaments hereinafter described.

Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of £. of lawful money of Great Britain and Ireland current in England, in hand paid by the said C. D. to the said A. B., at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said C. D., his heirs, executors, and administrators, and every of them for ever by these presents, and also in consideration of the covenants, conditions, and agreements hereinafter contained, and on the part of the said C. D., his heirs and (or "executors, administrators and") assigns to be kept and performed: He the said A. B. hath granted, demised, and enfeoffed, and by these presents doth grant, demise, and enfeoff to the said C. D., his heirs and (or "his executors, administrators, and") assigns, All &c. (*describing the premises,*) and all houses, outhouses, &c. (*b*) to have and to hold the said lands, &c. and all and singular the premises hereby granted, demised, and enfeoffed, or expressed and intended so to be, with their and every of their rights, members, and appurtenances to the said C. D., his heirs and (or "his executors, administrators, and") assigns, for and during the natural lives of &c., (*naming the nominees or cestuis que vie,*) yielding and paying &c. (*c*) (*insert here the usual covenants.* (*d*))

And the said A. B. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint, the

(b) See different forms of general words, *post.* 868.

(c) See form of *reddendum post.* 869.

(d) See forms of covenants, *post.* 870.

said E. F. (or if two persons be named attornies, "the said E. F. and G. H. jointly and severally") his true and lawful attorney, (or if two "attornies or attorney") for him and in his name, into and upon the said lands, tenements, hereditaments, and premises hereby granted, demised, and enfeoffed, or expressed and intended so to be, to enter, and full, quiet, and peaceable possession and seisin thereof for and in the name of the said A. B. to take and have: and such possession and seisin being so taken and had, the like possession and seisin thereof to the said C. D., his heirs and (or "his executors, administrators, and") assigns, or to his or their certain attorney or attornies, lawfully appointed and authorised to receive the same, to give and deliver according to the form and effect and true meaning of these presents. In witness, &c. (c)

Form of memorandum of livery of seisin to be indorsed on the deed of Feoffment.

Be it remembered, that on the day and year first within written, (or "on the day of ,," being after the date or delivery of the indenture of feoffment,) peaceable and quiet possession, and full seisin of the lands, tenements, and hereditaments within mentioned, to be granted, demised, and enfeoffed to the within mentioned C. D., his heirs, and (or "his executors, administrators, and") assigns, were openly had and taken by the within mentioned E. F., (or if two, "by the within mentioned E. F. and G. H.,") and by him (or "them") delivered in the name of, and for the said A. B. to the said C. D., to hold the same unto the said C. D. according to the purport and true meaning of the within written indenture, in the presence of us whose names are hereunto subscribed.

Signed N. O.
P. Q.

II. INDENTURE OF LEASE for a term of years.

This Indenture, &c.

Between A. B. of &c. of the one part, and C. D. of &c., of the other part.

Whereas the said A. B. hath agreed to demise the messuage, lands, tenements, and hereditaments hereinafter described, to the said C. D., for the term of years, to commence from the delivery of these presents, under and subject to the rents, covenants, and conditions hereinafter contained on the part of the said C. D.

Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the rent hereinafter reserved, and of the covenants, conditions, and agreements hereinafter contained on the part of the said C. D., his executors, administrators and assigns, to be respectively kept, observed and performed, and also in consideration of the sum of 5s. of lawful money of Great Britain and Ireland, current in England, to the said A. B. in hand

(c) See form of sealing and attestation, *ante*, 862.

paid by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged : he the said A. B. hath granted, bargained, sold, demised, leased and to farm let, and by these presents doth &c. unto the said C. D., his executors, administrators and assigns, all &c. and all houses, &c. (f) to have and to hold the said premises hereby demised, or intended so to be, unto the said C. D., his executors, administrators and assigns, from the delivery of these presents, for and during the full and complete term of years now next ensuing, yielding and paying, &c. (g) (*insert covenants, conditions, and agreements.* (h)) In witness, &c. (i)

III. INDENTURE OF LEASE *for a term of ninety-nine years, determinable on three lives.*

This Indenture, &c.

Between A. B. of &c. of the one part, and C. D. of &c. of the other part

Whereas the said A. B. hath agreed to demise the lands, tenements and hereditaments hereinafter described to the said C. D., for the term of ninety-nine years, from the delivery of these presents, determinable on the lives of the three persons hereinafter named, and the life of the survivor of them. And whereas the said C. D. hath named the lives of &c.

Now this Indenture witnesseth, that in pursuance &c., he the said A. B. hath granted, &c., to the said C. D., his executors, administrators and assigns, all &c., to have and to hold the said premises with the appurtenances unto the said C. D., his executors, administrators and assigns, for and during and until the full end and term of ninety-nine years, if the said &c., or the survivor of them, shall so long live, yielding and paying, &c. (*Here insert the usual covenants, &c.*) In witness, &c.

IV. A SHORT LEASE OR AGREEMENT *for letting a house for one year certain, and for such further term as both parties shall agree: subject after the expiration of the first year to three months' notice.*

Memorandum of agreement this day of between A. B. of &c., and C. D. of &c. The said A. B. doth let to the said C. D. and the said C. D. doth take all that messuage or tenement, with the appurtenances, situate at in the county of for one year certain, and for one year only from the delivery of these presents, and after the expiration of such one year for such longer time as both parties shall agree, or until the end of three months after notice shall be given by either of the said parties to the other of them, for leaving the said premises, at and for the yearly rent or sum of £. of lawful money of Great

(f) See form of general words, next

(h) See the common forms, *post.* 870.

(g) *Reddendum post.* 869.

[page. (i) See *ante.* 862.

Britain and Ireland current in England, or a proportionate part thereof for any time less than a year, that the said C. D. shall occupy the said premises after the expiration of the said first year hereinbefore mentioned. In witness, &c.

V. GENERAL WORDS, IN DEEDS.

1. *In leases of houses in cities, &c.*

And all outhouses, buildings, coachhouses, barns, stables, dove-houses, yards, cellars, areas, vaults, benefit and advantage of ancient and other lights, ways, paths, passages, drains, pipes, waters, watercourses, lawful and customary rights and privileges of common, and all the rights, privileges, advantages, easements and appurtenances whatsoever, to the said messuage or tenement and premises belonging, or in any wise appertaining, or with the same or any of them now or heretofore lawfully or usually holden, used, occupied, or enjoyed.

2. *General words in farming leases.*

And all houses, outhouses, buildings, stables, yards, gardens, orchards, meadows, feedings, pastures, commons, and all commonable lands, timber, and other trees, woods, underwoods, hedges, ditches, mounds, fences, ways, waters, watercourses, privileges, advantages, and appurtenances to the said farm, messuage, tenements, hereditaments and premises belonging or anywise appertaining, or at any time heretofore used, occupied or enjoyed therewith, or accepted, reputed or deemed as part or parcel thereof, or of any part thereof.

VI. EXCEPTIONS AND RESERVATIONS.

1. *Exception of trees, and reservation of power to fell them.*

Excepting out of this present demise and grant all and all manner of timber and other trees of what nature and kind soever, and young saplings likely to become timber; pollards and other trees now standing, growing or being, or which at any time hereafter shall or may stand, grow or be in or upon the said demised premises or any part thereof, with full power and free liberty for the said A. B., his heirs and assigns, and all other persons to be by him or them or any of them authorized to sell, stub, cut down, root, work up, cart, and carry away the same, with men and with horses, carts and carriages; and also with full liberty of ingress, egress and regress to view the said trees, by himself, themselves or their agents, in order to sell and dispose of and cut the same at all times and seasons.

2. *Exception of mines, and reservation of a power to work them.*

And also excepting all coals and seams of coals, mines, minerals and quarries of stone, beds of sand, gravel, marl, or clay of

what nature and kind soever, which now are, or at any time and from time to time hereafter, shall or may be found in, upon, or under the said hereby demised premises, or any part thereof, with free liberty of ingress, egress and regress to and for the said A. B., his heirs and assigns, and his and their agents, servants, and workmen, and all others to be by him or them, or any of them authorized to come into and upon the said hereby demised premises, and every part thereof, to work and dig for the said coals, mines, minerals and quarries of stone, beds of sand, gravel marl or clay, and to sell and dispose of whatever may be there found at his and their respective wills and pleasure; and also with full and free liberty to erect steam-engines, and to sink pits and make waggonways, and to use all other inventions of what nature or kind soever, for the winning, working, leading, carrying away, selling and disposing of the same.

VII. RESERVATION OF RENT AND OTHER PAYMENTS.

1. *Reservation of money rent.*

Yielding and paying yearly and every year, during the said term, (or in freehold leases "during the lives of the said &c.") unto the said A. B., his heirs and assigns, the clear yearly rent or sum of £. of like lawful money as aforesaid, by four equal quarterly payments, at the four usual quarterly feasts in each and every year during the said term, (or during the said lives,) that is to say, on the day of , the day of , the day of , and the day of , in every year, free and clear of and from all and all manner of parliamentary, parochial, and other taxes, the land-tax only excepted, the first of such quarterly payments to be made on the day of next ensuing the date and delivery of these presents.

2. *Reservation of a heriot on freehold leases, or on leases determinable upon lives.*

And also yielding and paying unto the said A. B., his heirs and assigns, immediately upon and after the death of any of the lives hereinbefore named, as also upon and immediately after the death of every person who shall be tenant for the time being of the said premises, the sum of £. of like lawful money for and in the name of a heriot.

3. *Reservation of an additional rent in case pasture land shall be broken up and ploughed.*

And also yielding and paying yearly and every year, during the said term, to the said A. B., his heirs and assigns, the yearly sum of £. of like lawful money as aforesaid, by four equal quarterly payments, for every acre of meadow or pasture ground, part of the premises hereby demised, that has not been ploughed or broken up within the space of fifty years before the day of the

date of these presents, which the said C. D., his executors, administrators, or assigns, shall plough or break up without any licence in writing from the said A. B., his heirs or assigns, the first of such payments to be made on the first rent day which shall happen next after the ploughing or breaking up of the same.

VIII. COVENANTS, CONDITIONS, AND PROVISOS.

1. *Covenant by lessor for quiet enjoyment.* † (k)

And the said A. B. doth hereby for himself, his heirs and assigns, covenant, promise, and agree to and with the said C. D., his executors, administrators, and assigns, that it shall and may be lawful for the said C. D., his executors, administrators, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said premises hereinbefore described and expressed, and intended to be hereby demised, and every part thereof, to and for his and their own use and benefit absolutely without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance whatsoever, of, from, or by the said A. B., or his heirs, or any other person lawfully or equitably claiming or to claim by, from, through, or under him or them.

2. *Covenant by lessee to pay the rent.* †

And the said C. D. doth hereby for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said A. B., his heirs and assigns, in manner following, that is to say, that he the said C. D., his executors, administrators, and assigns, shall and will from time to time, and at all times, during the continuance of the said term hereby granted, (*or in freehold leases "during the lives of the said, &c., and the life of the survivor of them,"*) well and truly pay or cause to be paid unto the said A. B., his heirs and assigns, the said yearly rent or sum of *l.* of such lawful money as aforesaid, upon the several days and times, and in the manner hereinbefore mentioned and appointed for payment of the same, according to the true intent and meaning of these presents.

3. *Covenant to pay taxes and rates.* †

And also that he the said C. D., his executors, administrators, and assigns, shall and will pay, satisfy, and discharge, or cause to be paid, satisfied, and discharged, all and all manner of parliamentary, parochial, and other taxes, rates, duties, assessments and impositions whatsoever, now or at any time hereafter during the said term hereby demised, payable for or in respect of the said premises, or any part of them, or the said yearly rent, the land-tax only excepted as aforesaid.

(k) Those marked thus † are usual.

4. *Covenant to repair, and leave in repair. † (l)*

And also that he the said C. D., his executors, administrators, and assigns, shall and will, at their proper costs and charges, from time to time during the said term, well and sufficiently repair, maintain, uphold, sustain, and keep all the said premises hereinbefore described, and intended to be hereby demised, and every part and parcel thereof; together with all buildings, improvements and additions whatsoever, which at any time during the said term shall be erected, set up, or made thereupon by him the said C. D., his executors, administrators, or assigns, in, by, and with all and all manner of needful and necessary reparations and amendments, when and as often as the same shall require; and the said premises, and every part thereof, being well and sufficiently repaired, maintained, upheld, sustained and kept at the end of the said term, shall and will peaceably and quietly leave and yield up to the said A. B., his heirs and assigns. Provided always, (m) that it shall and may be lawful to and for the said A. B., his heirs and assigns, or any of them, with workmen or others, or without, twice or oftener in every year yearly during the said term, at his and their wills and pleasure, at seasonable times in the day time to enter come into and upon the said demised premises or any part thereof, to view, search, and see the state and condition of the said premises and to give or leave notice to or for the said C. D., his executors, administrators, or assigns, for the repairing or amending of all and every such parts and part of the said premises as upon any such view or views it shall be found necessary to repair, within months next after such notice or warning; and the said C. D. doth hereby for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said A. B., his heirs and assigns, that he the said C. D., his executors, administrators, and assigns, shall and will within the said months next after every or any such notice or warning, well and sufficiently repair and amend all and every such parts and part of the said premises as shall be specified in the said notice or warning to stand in need of repair.

5. *Covenant to insure against fire. †*

And also that he the said C. D., his executors, administrators, and assigns, shall and will immediately after the commencement of the said term hereby demised at his and their expense and charges insure the said messuage, buildings, and premises hereinbefore described, and intended to be hereby demised, from accidents by fire in the Insurance Office, in London, or in some other good and reputable office to be approved of by the said A. B., his heirs or assigns, in the joint names of him the said A. B., his heirs or assigns, and the said C. D., his executors, administrators, or assigns, in the full sum of £. at the least, and continue the same, together with all other messuages which may

(l) See last page.

(m) This proviso is usual, but not necessary; and is greatly in favour of the lessee.

be erected upon the ground or scite thereof during the said term, in the said sum of £. or such other sum as for the time being shall be sufficient for rebuilding and reinstating the said messuage, buildings, and premises, in case the same, or any part of them, shall be burnt down, demolished, or damaged by fire. And shall and will from time to time, at the request of the said A. B., his heirs or assigns, produce unto him or them a receipt acquittance, or other voucher for the payment of such insurance for the then current year, and in default thereof that the said A. B., his heirs or assigns, shall and may insure the said messuage, building, and premises hereinbefore described, together with all such after erected buildings as aforesaid, in or for such sum or sums as are hereinbefore mentioned respectively; and shall be repaid the costs and expense thereof by the said C. D., his executors, administrators, or assigns, on the next quarter day of payment for the rent hereby reserved. And it is hereby further agreed that the sum which shall at any time be recovered and paid by virtue of any such insurance or insurances shall forthwith, and with all convenient speed, be laid out and applied in or towards rebuilding, repairing, and reinstating the whole or such part of the said messuage, buildings, and premises as shall happen to have been destroyed or damaged, as far as the same will extend. And moreover that in case the sum which shall be so insured upon the said messuage, buildings, and premises as aforesaid, shall be found insufficient for rebuilding, repairing, and reinstating the same in a good and substantial manner; then, and in every such case, the said C. D., his executors, administrators, or assigns, shall and will pay and make up all and every such deficiency and deficiencies out of his own proper monies, and lay out and expend the same in such rebuilding, repairing and reinstating the same as aforesaid.

6. Covenant to contribute to party walls, &c. in London.

And also shall and will during the said term as often as occasion shall require, bear, pay, and allow a reasonable sum towards the making, supporting, and repairing of all party walls, party gutters, and drains which shall belong to the said demised premises, or any part thereof, with all necessary reparations and amendments.

7. Covenant against exercising particular trades.

And also that he the said C. D., his executors, administrators and assigns, shall not, nor will at any time during the said term hereby granted use, exercise or carry on, or permit or suffer to be used, exercised or carried on, in or upon the said premises, hereinbefore described, and expressed to be hereby demised, or any part thereof, any or either of the trades of a vintner, &c., &c., &c. or any noisome, noisy or offensive trade or business, without the express consent in writing under the hand of the said A. B., his heirs or assigns; nor shall nor will, without such consent in writing as aforesaid, at any time during the said term, convert the

premises, or any part thereof, into a shop, warehouse or place of sale of any kind or description whatsoever.

8. *Covenant to cultivate a farm in a husbandlike manner.*† (n)

And also that he the said C. D., his executors, administrators, and assigns, shall and will from time to time and at all times during the continuance of the said term hereby granted, plough, dig, manure, and cultivate the said farm lands, tenements, hereditaments, and premises hereinbefore described, and expressed to be hereby demised, according to the best and most improved course of husbandry in that part of the country where the same are situated; and also shall and will from time to time and at all times, as aforesaid, preserve and keep all and singular the said lands, tenements, hereditaments, and premises, in a clean and husbandlike condition, in all respects free from all nettles, thistles, and other noxious weeds, growing or to grow on the said lands and premises or any part thereof. And also shall and will as often as there shall be occasion cut and make drains and ditches on such part of the said demised lands and premises as shall be of a wet and marshy nature, so as effectually to drain the same.

9. *Covenant to keep a flock of sheep upon the farm, and to fold them on the premises.*

And also shall and will from time to time and at all times during the said term keep a flock of sheep; and shall and will tether the same in a fair, proper and husbandlike manner on such part or parts of the said farm, lands, hereditaments, and premises as shall stand most in need of manure, except only during the last year of the said term hereby demised, when the same shall be tethered and folded on such part or parts of the same premises as the said A. B., his heirs or assigns, shall from time to time direct, and in default of such direction, then on such part or parts of the said farm lands or premises, as shall most want or require the same for the next crop.

10. *Covenant to fodder and litter out neat cattle.*

And also shall and will from time to time, and at all seasonable times during the said term hereby granted, fodder and litter out all the hay, straw, chaff, and stover which shall yearly arise from or upon the said land and premises during the said term for the purpose of being converted into dung, with neat beasts and other cattle on some part or parts of the said demised premises. And shall and will from time to time, and at all seasonable times, during the continuance of the said term lay, spread out, and expend in a husbandlike manner the manure and compost which shall be so made on such part and parts of the said farm lands and premises hereby demised as shall have most occasion for the same.

11. *Covenant to repair fences, &c. in and about the farm.*

And also shall and will from time to time during the term hereby granted make anew the quick and other hedges, ditches,

(n) See *ante*, 870.

and fences of or belonging to the said premises, or such part and parts thereof as shall require to be new made in a good and husbandlike manner, and at proper seasons of the year, and ditch, bank up, and fence the same hedges, and every of them, on either side according to the most approved mode of good husbandry; and so as to protect and preserve all such young trees and woods, as shall be growing therein, from being barked, destroyed or injured by cattle. And also shall and will at all times and from time to time during the said term foster and preserve the young trees, spires, and thrifts, and layers, and quicksets of all kinds standing, growing or being in or upon the said farm lands and premises or any parts thereof.

12. Covenant not to lop or cut trees, except by permission of lessor, his heirs and assigns.

And also shall not nor will at any time during the said term hereby granted hew, fell, cut down, lop, top, stub up, or destroy, or cause or suffer to be hewn, felled, cut down, lopped, stubbed up, or destroyed without the consent in writing of the said A. B., his heirs or assigns, any of the timber, timber like or other trees hereinbefore excepted, other than such as shall have been assigned or appointed to him or them by the said A. B., his heirs or assigns, for the repair of the said premises or any part thereof; nor cut down any alders, willows, salallows, pollards, hazels, thorns, bushes, springs, quicksets, wood or underwood, which are now growing or being on the premises, save only and except for necessary repairs and fences to be allowed and set out by the said A. B., his heirs or assigns. And that in case any of the said excepted trees or woods shall be so hewn, felled, cut down, lopped, topped, stubbed up or destroyed by the said C. D., his executors, administrators and assigns, or any of them, then and in such case the said C. D., his executors, administrators, and assigns, or some or one of them, shall and will pay unto the said A. B., his heirs or assigns, the sum of £. of like lawful money as aforesaid, for every load of timber and wood, and the sum of £. of like lawful money for every young tree of the age of years and upwards, likely to become timber, which shall be so hewn, felled, stubbed up or destroyed; and so proportionably for a greater or less number or quantity. Provided always, that the said C. D., his executors, administrators and assigns, shall and may at all times during the said term have and take the underwood growing upon the said lands and premises; and also lop the pollard trees, and trim the timber trees which have been heretofore lopped and trimmed, and the plashings of the quickhedges, as and for estovers, and by way of house-bote, plough-bote, cart-bote and hedge-bote, so as the same are taken in a husbandlike manner, and at all seasonable times of the year. And the said A. B. doth hereby for himself, his heirs and assigns, covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, that he the said A. B., his heirs and assigns, shall and will, when and as often as he or they shall be thereto reasonably requested by the said C. D., his executors, administrators or assigns, or any of them, assign and

set to the said C. D., his executors, administrators and assigns, a proper and sufficient number of timber trees, or quantity of timber from time to time for the requisite repairs of the houses, buildings, floors, gates, stiles and fences upon the said demised premises. And in case the buildings on the said premises, or any part thereof, shall be destroyed or damaged by storm, winds, or tempest, (other than by lightning) he the said A. B., his heirs and assigns, shall forthwith with all due and proper speed at his and their own expense rebuild, repair and reinstate, or cause to be rebuilt and reinstated, the same as the case may require.

13. *Covenant not to plough ancient pastures.*

And also that he the said C. D. shall not nor will at any time during the said demise, plough, break up or convert into tillage, nor cause nor suffer to be ploughed, broken up or converted into tillage, any part of the meadow or pasture land hereby demised, which has not been in tilth for years last past, nor dig nor break up for brick, tiles, turfs, flags or any other purpose, the said arable land, or any other part of the said premises, (except as hereinafter mentioned.) And in case all or any part of the said meadow, pasture or other ground not in tilth as aforesaid shall at any time during the continuance of the said demise be ploughed or converted into tillage, or any part of the said arable lands and premises shall be ploughed, sowed, used or managed contrary to the covenants herein contained, and contrary to the true intent and meaning of these presents; or in case any part of the said demised premises shall be dug or broken up for brick-earth, or for any of the purposes aforesaid, then and in such case the said C. D., his executors, administrators and assigns, shall and will during the then remainder of the said term pay unto the said A. B., his heirs or assigns, an increased or further yearly rent or sum of *l.* over and above the said original yearly rent of *l.* hereby reserved for every acre which shall be so ploughed or converted into tillage, or dug or broken up as aforesaid; or ploughed, sowed, used, or managed, otherwise than according to the covenants herein contained; and so for a greater or less quantity than an acre, the same to be paid and payable at such times and in such manner as the said original rent is hereby made payable. Provided always, and it is hereby agreed and declared that for and notwithstanding any thing hereinbefore contained to the contrary, it shall be lawful for the said C. D., his executors, administrators and assigns, at all times during the said demise to dig for and take any quantity of clay or marle out of any part of the said demised premises, as he or they shall judge proper, for the improvement of the lands hereby demised; and also all such quantity of gravel as shall be necessary to keep the roads in and upon the said premises in good repair and condition: but not for sale, nor for the purpose of carrying any part of the same off the demised premises.

14. Covenant or agreement respecting the mode of quilling the premises.

And it is hereby further agreed and declared by and between the said parties to these presents, and the said C. D. doth hereby for himself, his executors, administrators, and assigns, covenant, promise and agree to and with the said A. B., his heirs and assigns, (in manner following) that is to say, that he the said C. D., his executors, administrators and assigns, shall and will in the last year of the said term hereby granted or expressed, or intended so to be, lay all the crops of corn, grain, or pulse to grow or arise upon or from the said demised premises or any part of them in such year in the barns, and stack or rick yards belonging thereto, and in the winter next after the end of the said term shall and will thrash out or cause to be thrashed out the same upon the said premises, and leave the straw, chaff and fodder accruing therefrom in good condition on the said premises for the benefit of the said A. B., his heirs and assigns, without requiring any allowance or compensation for the same. And it is accordingly hereby agreed and declared that the said C. D., his executors, administrators and assigns, shall for the purpose aforesaid have the use of the barns and stack or rick yards upon or belonging to the said premises until the day of May next after the end of the said term hereby demised as aforesaid. And also shall have and retain the use of the stable for horses, and a lodging for a servant over the same, during such time as last aforesaid. And the said C. D. doth hereby for himself, his executors, administrators, and assigns, covenant, promise and agree to and with the said A. B., his heirs and assigns that he the said C. D., his executors, administrators, and assigns, shall and will at the end of the said term leave upon some convenient part of the said premises for the use and benefit of the said A. B., his heirs and assigns, one full moiety or half part of the hay which shall arise from the said demised premises in the last year of the said term, he the said A. B., his heirs or assigns, allowing unto the said C. D., his executors, administrators or assigns, such a sum of money as the same shall be adjudged to be worth by two indifferent persons, one to be chosen by the said lessor, his heirs or assigns, and the other by the said C. D., his executors, administrators, or assigns, or by an umpire or third person to be named by such two persons, in case of difference between them: and also that he the said C. D., his executors, administrators, or assigns, shall and will before the day of in the last year of the said term carry out and lay on upon such of the said demised premises, as are to be sown with corn in the winter next after the expiration of the said term, all such part of the muck, dung and compost, which shall be made or produced on the premises within the last year of the said term, as the said A. B., his heirs or assigns, shall direct. And also shall and will leave all the remainder of the said last year's muck, dung and compost in the yards belonging to the said farm, messuage and premises hereby demised, turned up in heaps, in a proper and husbandlike manner, for the use of the said A. B., his heirs or assigns, without

requiring any allowance or compensation for the same. And it is hereby agreed and declared that the said A. B., his heirs or assigns, or his or their lessees or lessee, or incoming tenant or tenants, shall be at liberty at any time within the last summer season next before the end of the said term hereby demised, to sow such of the said demised premises with turnips, as shall be fit and proper to receive and grow the same; and also full liberty to hoe and weed the same at pleasure; and free ingress, egress and regress with horses, carts, servants, and others for that purpose; and that the said C. D., his executors, administrators, and assigns, shall not suffer any sheep or cattle to depasture thereon, or the same to be otherwise damaged or destroyed. And it is also hereby agreed and declared, that it shall and may be lawful for the said A. B., his heirs and assigns, or his or their lessee or lessees, or incoming tenant or tenants, in the said last year of the said term hereby demised, to sow all such clover or grass seeds as he or they shall think proper, with the summer corn to be sown by the said C. D., his executors, administrators, and assigns; and also that he the said C. D., his executors, administrators, and assigns, shall and will harrow in such last mentioned seeds without any allowance for the same, and shall and will give at least one month's notice in writing under his hand to the said A. B., his heirs or assigns, of the time of sowing such summer corn as aforesaid.

15. *Covenants by lessor to renew.*

1. *To renew a lease for lives, or a lease determinable on lives.*

And the said A. B. doth hereby for himself, his heirs and assigns, further covenant, promise and agree to and with the said C. D., his heirs and assigns, (or "his executors, administrators, and assigns") that in case the said C. D., his heirs or assigns, (or "his executors, administrators, or assigns") shall upon the decease of any of the said &c. hereinbefore named, as *cestuis que vie* in the said lease hereby granted, except the survivor of them, be desirous to surrender this present lease for the purpose of taking a new lease for a further life or lives in being, and shall within three calendar months next after such decease nominate any person or persons in the room or stead of him or them who shall have so departed this life, nevertheless not exceeding the number of the lives dropped, he the said A. B., his heirs or assigns, shall and will at the costs and charges of the said C. D., his heirs or assigns, (or "his executors, administrators or assigns,") and on payment of the sum of £. of such lawful money as aforesaid by way of fine for such renewal make, execute, and deliver to the said C. D., his heirs or assigns, (or "his executors, administrators or assigns,") a new and fresh lease of all and singular the premises hereinbefore described, for and during the joint lives of the survivor of the said &c. so named as the *cestuis que vie* as aforesaid, and the lives of such person or persons as the said C. D., his heirs or assigns, (or "his executors, administrators or assigns,") shall have nominated as aforesaid under the

like covenants, provisos, and agreements, as are herein contained, excepting only this present covenant for renewal.

2. Covenant for renewal of a term of years.

And the said A. B. doth hereby for himself, his heirs and assigns, further covenant, promise, and agree to and with the said C. D., his executors, administrators and assigns, that in case the said C. D., his executors, administrators or assigns, shall be desirous of taking a new lease of the said premises after the expiration of the said term, and shall within six calendar months before the expiration thereof signify such his or their desire in writing, under his or their hand, he the said A. B., his heirs or assigns, shall and will, at or before the expiration of the said term, at the costs and charges of the said C. D., his executors, administrators or assigns, and on payment of the sum of *l.* of such lawful money as aforesaid, by way of fine for such renewal, make, execute and deliver, or cause to be made, executed and delivered, a new and fresh lease of all and singular the premises hereinbefore demised for a similar term of years, to commence from and after the expiration of the present term hereby granted, at and under the like covenants, provisos and agreements as are herein contained, excepting only this present covenant or agreement for renewal.

16. Proviso or condition of re-entry.

Provided always and these presents are upon the condition,

[1. Condition of re-entry on nonpayment of rent. (o)]⁺

That if the said yearly rent or sum of *l.* of such lawful money as aforesaid hereinbefore reserved, or any part thereof, shall be in arrear, and unpaid by the space of days next after any of the said days appointed for the payment thereof, or

[2. On assigning, &c. without licence.]

If the said C. D., his executors or administrators, shall without the consent in writing of the said A. B., his heirs or assigns, assign, set over, underlet, or otherwise part with the said premises, or any part thereof. Or,

[3. On neglect to insure against fire.]

If the said C. D., his executors, administrators or assigns, or any of them, shall neglect or omit to make such insurance as aforesaid. Or,

[4. On bankruptcy, insolvency, &c.]

If the said C. D. shall commit any act of bankruptcy under any of the statutes now in force relative to bankrupts, so as that a commission shall be awarded and is sued thereupon, or shall take the benefit of the acts now in force relative to insolvent debtors, or shall make any compromise with his creditors for less than 20 shillings in the pound, or shall suffer the said lease to be taken in execution by the sheriff under any writ of execution issuing out of any court of record in Great Britain, Ireland, or Wales. Or,

(o) See *ante*, 870.

[5. *On commission of waste.*]

If the said C. D., his executors, administrators or assigns, shall commit, or permit and suffer any spoil, destruction, decay or waste, in or about the said demised premises, or any part thereof, to the value or amount of l. of such lawful money as aforesaid in any one year, and shall not effectually amend, repair or make satisfaction for the same, within one calendar month next after notice thereof in writing, given to him or them for that purpose, under the hand of the said A. B., his heirs or assigns. Or,

[6. *On breach of any covenant.*]

If the said C. D., his executors, administrators or assigns, shall neglect or fail to perform, or be guilty of any breach, non-performance, or non-observance of any of the covenants, clauses, provisos and agreements by him or them to be observed, kept and performed according to the true intent and meaning of the same respectively.

Then and in every such case, or in any of such cases, it shall be lawful for the said A. B., his heirs and assigns, in and upon the said premises hereby demised, and every part thereof, to enter and to hold the same free and discharged of and from the said term or lease hereby demised, and of and from all and every the covenants, obligations, provisos and agreements hereinbefore contained.

17. *Proviso for determining the lease on six months' notice.*

Provided always that if the said C. D., his executors, administrators or assigns, shall be desirous to quit the said premises hereby demised, at the end or expiration of years of the said term, and of such his or their desire shall give six calendar months' notice thereof in writing to the said A. B., his heirs or assigns, before the expiration of such years of the said term, then and in such case all arrears of rent being duly paid, and all the said covenants having been duly performed, or if the said A. B., his heirs or assigns, shall be desirous to retake possession of the same premises or any part thereof, at the expiration of the same years of the said term, and shall give unto the said C. D., his executors, administrators or assigns, six calendar months' notice in writing before the expiration of such years of the said term, then and in either of such cases the said lease hereby granted, and every clause, matter or thing herein contained, shall be void to all intents and purposes, any thing hereinbefore contained notwithstanding.

IX. A LEASE OF A READY FURNISHED HOUSE.

This indenture, &c. (*as before.*)

Witnesseth that, &c. he the said A. B. hath granted, &c. unto the said C. D., his, &c. All that, &c. together with all the moveable furniture, goods, chattels, utensils and things, in or upon the said premises, or any part of them, or belonging to the same

specified in the inventory or schedule annexed to these presents. And all houses, &c. To have and to hold, &c. (*then proceed as in other leases, and after the covenant to leave the premises at the end of the term (p) add*). And also that he the said C. D., his executors, administrators and assigns, shall and will in like manner as aforesaid leave, surrender and yield up to the said A. B., his executors and administrators, all and singular the said moveable furniture, goods and things hereinbefore mentioned, and described in the said schedule hereunto annexed at the end or expiration of the said term of years, or other sooner determination of the present demise in the same plight and condition in which the same now are (reasonable use and wear thereof only excepted.)

In witness, &c.

Add the schedule or inventory to which the preceding indenture refers; the schedule need not be signed by the parties. By stat. 55 Geo. III. c. 184. Sched. Part I., if the inventory be separate and distinct from the lease, and is not indorsed or annexed, it is subject to a stamp duty of 1*l.* 5*s.*, and a further progressive duty of 1*l.* 5*s.*, after 2160 words for every entire quantity of 1080 words, over and above the first 1080 words.

X. A BUILDING AND REPAIRING LEASE.

This indenture, &c.

Whereas it hath been agreed by and between the said parties to these presents that the said C. D., his executors, administrators or assigns, shall at his and their own costs and charges pull down the messuages, houses and buildings hereinafter mentioned, and lay out the sum of *l.* in the erecting, building and finishing other new good and substantial messuages or houses in the place and stead of such houses and buildings so to be pulled down as aforesaid.

Now this indenture witnesseth, that in consideration of the said agreement, and also in consideration of the sum of 5*s.* of lawful money of Great Britain, in hand paid to the said A. B., by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said A. B. hath bargained, sold, demised, leased, and to farm let, and by these presents doth, &c. unto the said C. D., his executors, administrators and assigns, All that, &c. (*describing the premises*), And all houses, &c. (*general words as before*), To have and to hold the said houses and premises with their appurtenants, for and during the term or space of years at a pepper corn rent, in order and to the intent that he the said C. D., his executors, administrators or assigns, or some or one of them, may and shall within the said space of time, at his and their own proper costs and charges, pull down and demolish all and every the said messuages, tenements and buildings now standing, or being on the said piece or parcel of ground hereby demised, and may and shall in the room and place thereof, at his and their like costs and charges, erect, build and finish new, good and substantial

(p) See *ante*, 871.

houses or messuages, in conformity with the houses in the same street or row, together with stables, cellars, outhouses, and other conveniences usual in such houses or buildings, in a good, strong and workmanlike manner.

And he the said C. D. doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said A. B., his heirs and assigns, in manner following: (that is to say) that he the said C. D., his executors, administrators or assigns, or some or one of them, shall and will at his and their own proper costs and charges pull down, or cause to be pulled down, all the said messuages, houses and buildings hereinbefore described, situate, standing or being upon the said piece or parcel of land hereby demised during the said term; and shall and will within the same term, at his and their like costs and charges, erect, build and finish, or cause to be erected, built and finished new, good and substantial messuages or buildings, with stables, cellars, outhouses, and other conveniences usually attached to such buildings, with good and substantial materials, in a good and workmanlike manner, in the place and room of the said messuages or buildings so to be pulled down as aforesaid, and in conformity with the houses in the same row or street; and shall and will completely finish and render habitable the said messuages or buildings so to be erected; and also shall and will at his and their own proper costs and charges make or cause to be made a good and sound drain inches at least in diameter, to the satisfaction of the commissioners of sewers of the district in which the said houses or buildings shall be situate, in front of the same messuages or buildings, as and for a common sewer thereto; and also shall and will set up iron rails or palisadoes before the front of each of the said messuages or buildings, at a convenient distance from the same, so as to range in a straight line with the iron rails already set up in front of the houses heretofore erected in the said row and street; and also shall and will pave a convenient footway or passage, corresponding with the footway or passage in front of the said other houses in the said street; and also that he the said C. D., his executors, administrators and assigns, shall and will lay out and expend, in and about the said messuages, erections and buildings so to be erected and completed as aforesaid, the full sum of £. of such lawful money as aforesaid at the least, and produce to the said lessor, his heirs or assigns, or his or their surveyor, proper vouchers and evidences of the workmanship thereof for the same, so that it may satisfactorily appear that the said sum has been so expended, and the said messuages and buildings completed in the manner hereinbefore expressed. And further that he the said C. D., his executors, administrators and assigns, shall and will at his and their like costs and charges as aforesaid, build if necessary the party walls on all sides of the said new messuages, erections or buildings so to be erected as aforesaid; and after the same are so erected and built, that he the said C. D., his executors, administrators and assigns, shall and will permit and suffer any or all of the tenants of him the said A. B., his heirs and assigns, to make use of such party walls, without

rendering or paying any compensation for the same. And the said C. D. doth in the manner aforesaid covenant, promise and agree, that he the said C. D., his executors, administrators and assigns, shall and will, from and immediately after the completion of the said messuages or buildings so to be erected as aforesaid, and from time to time, and at all times during the said term hereby granted, at his and their own costs and charges, keep and support the same and every part thereof in good and sufficient repair; and the same premises and every part thereof, with the appurtenances so being well and sufficiently repaired, sustained and maintained at the end or sooner determination of the said term, shall and will peaceably and quietly deliver up to the said A. B., his heirs and assigns (*add the other usual covenants.*)

And it is hereby further agreed and declared by and between the said parties hereto, and the said C. D. doth hereby for himself, his executors, administrators and assigns, covenant, promise, and agree to and with the said A. B., his heirs and assigns, that he the said C. D., his executors, administrators and assigns, shall and will, if required by the said A. B., his heirs or assigns, by any note in writing signed by him or them, surrender and yield up these presents, and the lease or term hereby granted, and all his and their interest in the said building so to be erected as aforesaid; and in lieu thereof accept of several leases for each of the said messuages, houses or buildings so to be erected as aforesaid, for the term of _____ years in each such lease, at the yearly rent of *l.* respectively; and under and subject to the usual covenants, agreements and conditions inserted in leases of a like nature. And he the said A. B. doth hereby for himself, his heirs and assigns, covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, that he the said A. B.; his heirs and assigns, shall and will on a like demand in writing, signed by the said C. D., his executors, administrators or assigns, during and previous to the expiration of the said term hereby granted, and upon such surrender being made as aforesaid, grant, execute and deliver such leases as aforesaid to the said C. D., his executors, administrators or assigns; which said leases shall be made and prepared by the attorney or agent of the said A. B., his heirs or assigns, at the sole costs and charges of the said C. D., his executors, administrators or assigns.

In witness, &c.

XI. AN UNDERLEASE by a lessee for years.—*The underlessee paying for improvements: with a covenant to renew the underlease upon a renewal of the original lease.*

This Indenture, &c.

Whereas by an indenture of lease, bearing date the _____ day of _____, and made or expressed to be made between X. Y., therein described of the one part, and the said A. B. of the

other part ; the said A. B. is possessed of or entitled to the lands, tenements and hereditaments hereinafter described, with their appurtenances, for and during the residue of a term of years therein now to come and unexpired.

And whereas the said A. B. hath laid out divers sums of money amounting in the whole to the sum of £. in improving the same lands, hereditaments and premises.

And whereas the said A. B. hath agreed to demise the said lands, hereditaments and premises to the said C. D. for all the residue of the said term of years, now to come and unexpired, except one month previous to and before the end of the said term, and in consideration thereof the said C. D. hath agreed to pay to the said A. B. the sum of £. in recompence and towards satisfaction for the expense of the improvements so made by the said A. B. as aforesaid.

Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of, &c., he the said A. B. hath demised, leased and to farm let, and by these presents doth, &c., unto the said C. D., his executors, administrators and assigns, All that, &c., and all houses, &c. To have and to hold the said premises, with their appurtenances, unto the said C. D., his executors, administrators and assigns, for and during the rest and residue of the said term of years so created by the said recited indenture, of the day of now to come and unexpired. Saving nevertheless, and except one month previous and at the end of the said term. Yielding and paying, &c. (*Usual covenants: after the covenant for quiet enjoyment add*) And further, that in case he the said A. B., his executors, administrators or assigns, at any time hereafter during the said term hereby granted to the said C. D., his executors, administrators and assigns, shall take any new lease of the said premises hereinbefore described from the said X. Y., his heirs or assigns, then he the said A. B., his executors, administrators or assigns, shall and will make a new lease thereof to the said C. D., his executors, administrators or assigns, or to such person or persons as he or they shall appoint, for and during the term of such new lease so to be obtained from the said X. Y., his heirs or assigns, saving always and except a month or thereabouts, previous to and at the end of the same, at and under the same yearly rent as that hereinbefore reserved, without any fine or foregift ; and under and subject to the same covenants, conditions and provisos as are contained in these presents, this present covenant for renewal only excepted.

In witness, &c.

XII. LEASE under the stat. 32 Hen. VIII. by a husband seised in right of his wife, and his wife.

This Indenture, &c., between A. B., of, &c., and C., his wife, of the one part, and D. E., of, &c., of the other part.

Whereas the said C., the wife of the said A. B., is seised of or entitled to an estate of inheritance in feesimple of and in the farm, lands, tenements and hereditaments hereinafter described, and intended to be hereby demised. And the said A. B. is seised of the same premises during the coverture, in her right.

And whereas the said A. B. hath agreed to demise the said farm, hereditaments, and premises to the said D. E. for the term of twenty-one years, at the rent, and under and subject to the covenants and agreements hereinafter reserved and contained.

Now this indenture witnesseth that in pursuance of the said agreement, and also in consideration of the rent and covenants hereinafter reserved and contained on the part of the said D. E., his executors, administrators, and assigns, to be paid, observed, and performed; and also in consideration of the sum of 5*s.* of lawful money of Great Britain, in hand paid to the said A. B. by the said C. D. at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said A. B. and C. his wife have, and each of them hath bargained, sold, demised, leased, and to farm let, and by these presents, do, and each of them doth, &c. unto the said D. E., his executors, administrators and assigns, all, &c. And all houses, &c. To have and to hold the said premises, with their appurtenances, unto the said D. E., his executors, administrators, and assigns, for and during and until the full end and term of twenty-one years now next ensuing from the day of the delivery of these presents; yielding and paying for the same yearly and every year during the said term unto the said A. B. and C. his wife, and her heirs and assigns, the yearly rent or sum of *l.* at the four usual feasts, or rent-days, in every year, *viz.*, &c.; the first of such payments to be made on the first of such days that shall occur after the delivery of these presents. (*Add the usual covenants, with the variation "A. B. and C. his wife, and her heirs and assigns," instead of "A. B., his heirs and assigns."*)

In witness, &c.

(L. S.)	A. B.
(L. S.)	C. B.
(L. S.)	D. E.

Attestation.

Signed, sealed, and delivered by the
said A. B., and sealed by the said
C. his wife, in the presence of us
whose names are underwritten.

L. M.
N. O.
P. Q.

XIII. A LEASE under a power to lease for twenty-one years at rack-rent.

This Indenture, &c.

Whereas by indentures of lease and release, bearing date re-

respectively the and days of , the release being expressed to be made between. &c.; the lands, tenements, and hereditaments hereinafter described were appointed, conveyed and assured unto the said A. B. for life, with remainders over in the usual manner of strict settlements; and in and by the same indenture of release a power was reserved to the said A. B. to make leases of the same premises, or any part thereof, for the term of twenty-one years, in possession and not in reversion, nor by way of a future interest, at the best and most improved rent which can be gotten for the same, without taking any fine, premium or foregift; and so that in every such lease there be contained a condition of re-entry on nonpayment of the rent to be thereon reserved by the space of twenty-one days next after the same shall become due and payable; and so that the lessee or lessees to whom such lease shall be made seal and deliver a counterpart thereof, and so that no such lessee be punishable for waste.

And whereas the said A. B. hath agreed to demise the said premises by virtue of and according to the said recited power so reserved to him as aforesaid, the said lands and premises hereinafter described, to the said C. D. at the yearly rent of £. being the best and most improved rent which can be gotten for the same, without any fine, premium or foregift, and under and subject to the covenants, conditions and agreements hereinafter contained.

Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of the rent, covenants and conditions hereinafter reserved and contained, by and on the part of the said C. D., his executors, administrators and assigns, to be paid, kept, observed and performed; he the said A. B., in pursuance of the power or authority given or reserved to him in and by the said recited indenture of release, and by force and virtue thereof, and of every other power and authority to him given or reserved, in him vested or in any wise enabling him in this behalf, hath directed, limited and appointed, and by this present deed or instrument in writing doth direct, limit and appoint that the lands, tenements and hereditaments hereinafter described, and intended to be hereby demised, with the appurtenances, shall henceforth remain, continue and be to the use of the said C. D., his executors, administrators and assigns, for and during, and unto the full end and term of twenty-one years.

And this indenture further witnesseth that in pursuance of the said agreement, and for the considerations aforesaid, he the said A. B. hath granted, demised, leased and to farm let, and by these presents doth, &c. unto the said C. D., his executors, administrators and assigns, all that piece or parcel of land, &c., and all houses, &c. To have and to hold the said land and premises, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, from henceforth for and during, and unto the full end and term of twenty-one years now next ensuing. Yielding and paying during the said term yearly and every year the sum of £. at the four usual feasts or rent days in each

year, viz., &c. the first of such payments to be made on the first of such days that shall occur after the sealing and delivery of these presents. (*Add the usual covenants and the condition of re-entry in pursuance strictly of the power; and then the following :*)

Provided always, and it is hereby further agreed and declared by and between the said parties hereto, that in case these presents shall by any mistake or inadvertency be not pursuant to the said recited power, or become void by any other means as an appointment under the said power, or any other power vested in the said A. B., or enabling him in this behalf; then and in such case these presents and the term or interest expressed, and intended to be granted thereby, shall nevertheless be good, and shall take effect out of the interest of the said A. B. in the said lands and premises hereby demised, as if no such appointment in pursuance of such power had been made.

In witness, &c.

(L. S.)
(L. S.)

A. B.
C. D.

Signed, sealed and delivered in the presence of us whose names are underwritten.

L. M.
N. O.

XIV. FORM OF LEASE (*a*) *in schedule D. of the statute 52 Geo. III. c. 161. intituled "An Act to enable his Majesty to grant leases under certain circumstances."*

These are to witness, that in consideration of the annual rent or sum of *l.* hereinafter reserved to be paid by X. Y., of, &c. the commissioners of his Majesty's woods, forests and land revenues, (*or the surveyor-general of his Majesty's woods and forests, as the case may be*) by the authority of the lords commissioners of his Majesty's treasury, for and on behalf of his Majesty doth (*or do*) by these presents grant, demise, lease, and to farm let to the said X. Y., his executors, administrators and assigns, all, &c. (*describe the parcels of land*); to have and to hold the said parcels, &c. hereby demised, and all benefit and advantage thereto belonging unto him the said X. Y., his executors, administrators and assigns, for and during the term of years; yielding, and paying by half-yearly payments to the said surveyor-general or to the said commissioners for the time being the annual rent or sum of

l. In witness whereof the said and the said X. Y. have hereunto set their hands and seals this day of in the year, &c.

Witness
L. M.

(L. S.)
(L. S.) X. Y.

(*a*) See *ante*, 94.

**XV. FORM OF LEASE OF TITHES IN IRELAND ACCORDING TO
THE LATE STATUTE 3 GEO. IV. C. 125. s. 17. (b)**

This indenture made the day of between
A. B., (*the lessor of the tithes*) of of the one part, and
C. D. [or C. D., and E. F.,] (the person or persons beneficially
interested in the land *as the case may be*, to whom the said lease
is to be made), of the other part. Whereas the said C. D., [or
C. D. and E. F., *as the case may be*] is [or are] entitled to all
that and those [here describe the lands] situate, lying and being in
the parish of [if any] barony of [if any] and county of
for the term of years, or for and during the life [or
lives] of [here set out the lessee's interest]; and whereas the said
lands are subject to the payment of tithe or half or other portion of
tithe to the said A. B. and his successors, [here set out in what right
they are entitled to the said tithe or half or other portion of tithe.]
And whereas the said A. B., (with the consent of G. H., patron,
&c. and J. K., ordinary, &c. *as the case may be*, testified by
indorsement on this present indenture) hath agreed to demise the
said tithe or half or other portion of tithe of the said lands, ac-
cording to the statute in such case made and provided, on the
terms hereinafter contained. Now this indenture witnesseth
that the said A. B., for and in consideration of the rents and cove-
nants hereinafter contained, hath demised, granted and set, and
by these presents doth demise, grant and set all and every the
said tithes or half or other portion of tithes, so payable to the
said A. B. and his successors, out of the said lands, and every
part and parcel thereof, to have and to hold the same to the said
C. D., [or to the said C. D. and E. F., *as the case may be*] or to
his [or their] heirs, executors, administrators and assigns, being
occupiers [or owners] of the said land, from the first day of May
last past, [or next coming *as the case may be*] for and during and
unto the full end and term of years [adding, *if the interest
of such lessee shall be for a life or lives not renewable, these words,
to wit, "provided the said life or lives or any of them (as the case
may be) shall so long continue."*] And the said C. D., [or C. D. and
E. F., *as the case may be*] in consideration thereof, hath given and
granted, and by these presents doth give and grant unto the said
A. B. and his successors, one yearly rent or sum of clear of
all taxes, charges, assessments and impositions, to be issuing out
of all that and those the lands and tenements aforesaid, to have and
to hold the said yearly rent or sum of to the said A. B.
and his successors from the first day of May aforesaid, for and
during the continuance of the demise so made, to the said C. D.
[or C. D. and E. F., *as the case may be*] as aforesaid, the said
yearly rent or sum to be paid and payable by two equal half-
yearly payments on every first day of November and first day of
May during the said term. And further the said C. D. [or C. D.
and E. F., *as the case may be*] doth [or do and each of them doth]
grant and agree to and with the said A. B. and his successors, that

in case the said yearly rent, or any gale or part thereof, shall at any time be due and unpaid by the space of three calendar months after any of the said days of payment thereof, then and in every such case it shall and may be lawful to and for the said A. B. and his successors into the said lands and tenements, or any part or parts thereof, to enter and distrain, and the distress and distresses there found to take, lead, drive, carry away, sell and dispose of, according to law, for the recovery of the sum or sums to them due, and the reasonable costs of so recovering the same. And it is hereby further agreed by and between the said parties, that in case the said rent, or any gale thereof, shall be due, behind and unpaid for the space of three calendar months next after any of the said gale days respectively, then and in every or any such case the said demise hereinbefore contained, and every part thereof, shall at the election of the said A. B. and his successors, but not otherwise, be and be deemed and taken to be null and void to all intents and purposes from the said gale day. And in such case it shall and may be lawful to and for the said A. B. and his successors to take and receive all and every tithe, or half or other portion of tithe, of the growth, produce or increase of the said lands or of any part thereof, which shall have been severed since the day from which such lease shall be so void, or to proceed for or in respect of the subtraction thereof, in the same manner in all respects as if this lease had not been made. And the said C. D., for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said A. B. and his successors that he the said C. D., his heirs, executors, administrators and assigns, or some of them, shall and will from time to time hereafter well and truly pay or cause to be paid unto the said A. B. and his successors the said yearly rent or sum of _____ at the days and times hereinbefore mentioned for the payment thereof, by even and equal portions as aforesaid, [or the said C. D. and E. F. do respectively for themselves, their heirs, executors, administrators and assigns, covenant, promise and agree to and with the said A. B. and his successors, that they will respectively from time to time hereafter, when and so long as their interest shall continue to be, or shall become vested in possession, well and truly pay or cause to be paid to the said A. B. and his successors the said yearly rent or sum of _____ by equal and even portions as aforesaid.] In witness whereof the parties aforesaid have hereunto set their hands and seals the day and year first above written.

III. PRECEDENTS OF ASSIGNMENTS.

I. ASSIGNMENT OF A LEASE FOR LIVES, BY LEASE AND RELEASE.

1. *Bargain and sale for a year.*

This Indenture, &c.

Witnesseth that the said A. B. in consideration of 5s. of lawful money of Great Britain, to him in hand paid by the said C. D., at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged) hath bargained and sold, and by these presents doth bargain and sell unto the said C. D., his executors, administrators and assigns, all those, &c., and all houses, &c., and all the estate, right and interest in the same, which the said A. B. now hath by virtue of an indenture of feoffment bearing date, &c. and of livery made in pursuance thereof, to have and to hold the said messuages, lands, hereditaments and premises with their appurtenances, unto the said C. D., his executors, administrators and assigns, from the day next before the day of the date of these presents, for and during and unto the full end and term of one whole year thence next ensuing, and fully to be complete and ended; yielding and paying therefore the rent of one pepper-corn at the expiration of the said term, if the same shall be lawfully demanded, to the intent and purpose that by virtue of these presents, and by force of the statute for transferring uses into possession, the said C. D. may be in the actual possession of the same premises, and may thereby be enabled to accept and take a grant and release of the freehold and reversion of the same premises, and of every part and parcel thereof, to the said C. D., his heirs and assigns, by another indenture already prepared, and intended to be dated the day next after the date hereof.

In witness, &c.

2. *The Release.*

This Indenture, &c. between A. B. of, &c. of the one part and C. D. of, &c. of the other part.

Whereas by indenture bearing date, &c. and made or expressed to be made between X. Y., of, &c. of the one part and the said A. B. of the other part, and by livery of seisin made in pur-

suance thereof, all, &c. (*describe the premises as in the original lease leaving out the general words*) with their appurtenances, were demised to the said A. B., his heirs and assigns, for and during the natural lives of, &c. therein named who are all now living.

And whereas the said A. B. hath contracted to sell all his estate and interest in the said premises to the said C. D. at and for the price or sum of *l.*

Now this indenture witnesseth that in pursuance of the said contract and in consideration of the sum of *l.* of lawful money of Great Britain and Ireland, current in England, in hand paid to the said A. B. by the said C. D., at or before the sealing and delivery of these presents, the payment and receipt of which said sum of *l.* he the said A. B. doth hereby acknowledge, and of and from the same and from every part thereof doth acquit, release and discharge the said C. D., his heirs, executors, administrators and assigns for ever, by these presents he the said A. B. hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said C. D. (in his actual possession, now being by virtue of a bargain and sale to him thereof made by the said C. D. in consideration of *5s.* in and by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale and by force of the statute for transferring uses into possession,) and to his heirs, all those, &c. together with all houses, &c., and all the estate, right, title, interest, use, trust, property, claim and demand whatsoever of him the said A. B., of, in, to, or out of the said messuages or tenements, lands, hereditaments and premises, hereby granted and released, or intended so to be, and every of them, and every part and parcel thereof, together with the said recited indenture of lease, and such other deeds, evidences and writings, as relate to or concern the premises expressed to be hereby assigned, now in the custody or power of the said A. B., or which he can procure without suit at law or in equity, to have and to hold the said lands, tenements, hereditaments and premises hereinbefore expressed, to be hereby released and assigned with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns, for and during the lives of the said, &c. subject nevertheless to the payment of the rent and performance of the covenants, conditions and agreements in and by the said recited indenture, of the *day of* reserved and contained, and on the part of the said C. D., his heirs and assigns, to be paid, kept, observed and performed. (*Add covenants for title, further assurance and quiet enjoyment, and other usual covenants.*) (*b*)

Note. *If the vendor be seized of the freehold estate in right of his wife, and it is intended to pass her interest absolutely, there should be a covenant to levy a fine sur concessit, and the recitals and covenants for title should be shaped accordingly.*

(b) See the forms *post.* 893.

Form of covenant to levy a fine sur concessit.

And for the more effectually and satisfactorily conveying and assuring the said hereditaments and premises hereinbefore expressed, to be hereby released and assigned to the said C. D., his heirs and assigns, during the lives of the said, &c. as aforesaid, free from all charges and incumbrances, and particularly from all right and title, of or in the said the wife of the said A. B., he the said A. B. doth hereby for himself, his executors and administrators, and also for the said his wife, covenant, promise and agree, to and with the said C. D., his heirs and assigns, that they the said A. B. and his wife, or her heirs, shall and will at the proper expense and charges of the said A. B., his executors or administrators, well and duly acknowledge and levy, or cause to be acknowledged and levied unto the said C. D., his heirs and assigns, before the justices of his Majesty's Court of Common Pleas at Westminster (or "at the next great session," or "general sessions," to be holden in and for the said county "if in Wales or counties palatine,") one or more fine or fines *sur concesserunt*, of all and singular the messuages, lands, tenements and hereditaments hereinbefore expressed, to be hereby assigned and released, or intended so to be. And it is hereby agreed and declared by and between the several parties to these presents, and they do hereby direct that the said fine or fines shall be and enure to the use of the said C. D., his heirs and assigns, for and during the lives of the said, &c. hereinbefore named, and the life of the survivor of them, according to the true intent and meaning of these presents, freed and discharged of and from all right and title of the said the wife of the said A. B., or her heirs, in or to the same hereditaments and premises, or any part thereof,

II. *ASSIGNMENT of a lease for 99 years determinable on three lives; the consideration to be paid in stock in the public funds.*

This Indenture, &c.

Whereas by indenture of lease bearing date, &c. and made between, &c. all those, &c. (*describing the premises as in the original indenture, but omitting the general words,*) with their appurtenances, were demised unto the said X. Y., for the term of 99 years determinable on the lives of, &c. hereinafter named, who are now all living.

And whereas by mesne assignments and other acts, good and available in law, and lastly by an indenture bearing date the &c. and made or expressed to be made between, &c. the said hereditaments and premises hereinbefore described, and comprised in the said recited indenture of lease, were assigned and conveyed to the said A. B. for all the rest and residue of the said term of 99 years so determinable as aforesaid, then to come and unexpired.

And whereas the said A. B. hath contracted to sell the same premises, and all his right and interest therein, to the said C. D.,

in consideration of the transfer of £. 3 per cent. Bank Consolidated Annuities.

Now this indenture witnesseth that in performance of the said contract, and also in consideration of the capital sum of £. 3 per cent. Bank Consolidated Annuities, this day well and truly transferred by the said C. D. into the name and for the benefit of the said A. B., in the books of the Governor and Company of the Bank of England, the transfer of which said sum of £. 3 per cent. Bank Consolidated Annuities the said A. B. doth hereby acknowledge, and of and from the same, &c. (b) He the said A. B. hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth, &c. unto the said C. D., his executors, administrators and assigns, All the said messuages, hereditaments and premises hereinbefore described and comprised in the said first recited indenture of lease-bearing date, &c. with all and singular the rights, members and appurtenances to the same belonging, or therewith usually or now holden, occupied and enjoyed, And all the estate, &c. And the said indenture of lease first hereinbefore recited, And all other deeds, &c. To have and to hold the said messuages, hereditaments and premises, with their appurtenances, unto the said C. D., his executors, administrators and assigns, from henceforth for and during all the rest, residue and remainder of the said term of 99 years granted in and by the said hereinbefore first recited indenture of the day of yet to come and unexpired, if the said, &c. or the survivor of them, shall so long live. Subject nevertheless to the payment of the rent and observance of the covenants, conditions and agreements in the said first recited indenture of leases reserved and contained, and on the lessee's part to be paid, observed and performed. (*Add the usual covenants.*) (c)

In witness, &c.

III. ASSIGNMENT of a lease for 21 years, after a sale by auction.

This Indenture, &c.

Whereas by an indenture of lease bearing date, &c. and made between, &c. All those, &c. (*describe the parcels as in the original lease, omitting the general words*) with their appurtenances, were demised to the said A. B. for the term of 21 years. (d)

And whereas all the estate, right and interest of the said A. B., in the said messuages, hereditaments and premises, in by and under the said recited indenture of lease, were put up to sale by public auction, at, &c. on the day of now last past, when the said C. D. was declared to be the highest bidder or purchaser thereof, being the lot No. in the printed particulars of sale thereof, at the sum of £.; and thereupon paid into the hands of the auctioneer at such sale the sum of £. by way of deposit, and in part of the said purchase money, conformably to

(b) See ante 890.

(c) See next page.

(d) See form of recital of mesne assignments in the last precedent.

the conditions of sale contained in the said printed particulars there exhibited.

Now this indenture witnesseth that in pursuance of the said contract by public auction, and in consideration of the said sum of £. paid by way of deposit, and in part of the said purchase money or sum of £. And also in consideration of the sum of £. in hand paid to the said A. B. by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, which said two sums of £. and £. amount in the whole to the said purchase money or sum of £. of and from which, and every part of which, he the said A. B. doth acquit, &c. He the said A. B. hath granted, bargained, sold, assigned, transferred and set over, and by these presents, doth, &c. unto the said C. D., his executors, administrators and assigns, all the said messuages, lands, hereditaments and premises comprised in the said indenture of lease, with their appurtenances, And all the estate, &c. And the said indenture of lease of the said day of , And all other deeds, &c. To have and to hold the said hereditaments and premises hereinbefore described and expressed to be hereby assigned, with all and singular their appurtenances, for and during all the rest and residue now to come and unexpired of the said term of 21 years, so created by the said indenture of lease as aforesaid, nevertheless under and subject, &c. (*add the usual covenants*).

In witness, &c.

IV. COVENANTS.

1. *Covenant for title.*

And the said A. B. doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said C. D., his heirs, executors, administrators and assigns, (or "his executors, administrators and assigns") in manner following, (that is to say) that for and notwithstanding any act, deed, matter or thing whatsoever, at any time heretofore made, done, committed, executed, or knowingly omitted or suffered by him to the contrary, the said hereinbefore recited indenture of the day of ("with the livery consequent thereon," *if a feoffment*) is a good and valid demise and lease in all respects, both at law and in equity, and is not in any manner forfeited, surrendered or otherwise become void or voidable. And also that for and notwithstanding any such act, deed, matter or thing as aforesaid, he the said A. B. hath in himself and in his own right full power, and lawful and absolute authority to grant, bargain, sell, alien, (release) and assign, all and singular the said hereditaments and premises hereinbefore expressed to be hereby assigned and conveyed, according to the true intent and meaning of these presents.

2. *Covenant for quiet enjoyment.*

And further that it shall and may be lawful to and for the said C. D., his heirs (or his executors, administrators) and assigns, from time to time, and at all times hereafter during the continuance of the said demise or lease, hereby assigned and conveyed, peaceably and quietly to enter into, and to have, hold, use, occupy, possess and enjoy the said messuages, tenements, hereditaments and premises hereinbefore described, and to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, denial, eviction or interruption, of from or by the said A. B., or of from or by any other person or persons lawfully claiming, or to claim from by under or in trust for them or any of them, And that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise by the said A. B., his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of from and against all and singular former and other gifts, grants, bargains, leases, mortgages, estates, titles, troubles, charges and incumbrances whatsoever, had, made, done, committed or suffered by the said A. B., or by any other person or persons lawfully claiming, or to claim by, from, through, or under him.

3. *Covenant for further assurance.*

And moreover that he the said A. B., his heirs, executors and administrators, (or "his executors and administrators," *in case of chattel leases*) and every other person having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, trust or interest, in to or out of the said messuages, lands, tenements, hereditaments and premises hereinbefore expressed, to be hereby assigned and conveyed, or intended so to be, or any part thereof, from by under or in trust for him, them, or any of them, shall and will from time to time, and at all times hereafter during the continuance of the said lease, (or "term") hereby assigned and conveyed on every reasonable request, and at the proper costs and charges in the law of the said C. D., his heirs (or "his executors, administrators") and assigns, make, do and execute, or cause or procure to be made, done and executed, all such further and other lawful and reasonable acts, deeds and things, assignments, conveyances and assurances in the law whatsoever, for the better more perfectly and absolutely assigning and assuring the said messuages, lands, tenements, hereditaments and premises, unto the said C. D., his heirs (or "his executors, administrators") and assigns, during the lives of the said, &c. and the life of the survivor of them, (or "during all the rest and residue of the said term of years therein") as the said C. D., his heirs (or "his executors, administrators") and assigns, or his or their counsel in the law, shall reasonably advise, devise or require, so that the person or persons who shall be required to make, do and execute such further assurance or assurances, be not compelled nor compellable for

the making or doing thereof, to go or travel from his or their respective dwelling or dwellings, or usual place or places of abode.

4. *Covenant by the assignor that the rent and taxes have been paid, and all the covenants and agreements on the part of the tenant have been performed up to a certain time.*

And further that the rent in and by the said recited indenture of lease reserved, and the covenants, conditions, and agreements therein contained, and on the lessee's part to be paid, kept, observed, and performed, and all taxes, rates, and assessments, due and payable by the occupier of the said premises, are and have been well and truly paid, kept, done, performed, and fulfilled up to the day of last.

5. *Covenant by the assignee to pay the rent, and perform the covenants in the lease.*

And the said C. D. doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree, to and with the said A. B., his heirs, executors and administrators, in manner following (that is to say,) that he the said C. D., his executors, administrators and assigns, during the continuance of the said demise, shall and will pay the said rent in and by the said indenture of lease reserved and contained, and perform and keep all and singular the covenants, conditions, and agreements therein contained, and which from the said day of last, by and on the part of the tenant or assignee of the said premises, are or ought to be paid, performed and kept, according to the purport and true intent and meaning of the said recited indenture of lease.

6. *Covenant of indemnity.*

And shall and will from time to time, and at all times during the continuance save, defend, keep harmless, and indemnified, the said A. B., his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of and from the same rents, covenants and agreements, and every breach, default or neglect, of or in payment or performance thereof respectively. And of, from and against all actions, suits, costs, damages and expenses whatsoever, which he, or they, or any of them, shall or may pay, bear, or sustain, or which shall or may arise, or be occasioned by reason of the non-payment of the said rent, or the non-performance or non-observance of the said covenants or agreements.

V. *ASSIGNMENT of part only of the premises, with a covenant to produce the lease when required.*

This Indenture, &c.

Whereas by indenture of lease bearing date, &c., and made between, all those &c. (*describe the parcels intended to be assigned in the words of the original lease omitting the general words*) with

their appurtenances, were, together with other hereditaments of much greater value, demised to the said A. B., for the term of years from the date of the same indenture.

And whereas the said A. B. hath contracted to sell the said hereditaments and premises hereinbefore described, to the said C. D., for and during all the residue of the said term now to come and unexpired.

And whereas it hath been agreed that the said recited indenture of lease should remain in the hands of the said A. B., his executors, administrators and assigns, upon his entering into such a covenant for producing the same, and giving attested copies thereof, as hereinafter expressed.

Now this indenture witnesseth that &c., he the said A. B. hath granted &c. to the said C. D., his executors, administrators and assigns, the said messuages, hereditaments and premises hereinbefore described, being part of the hereditaments contained in the said indenture of lease, with their rights, members and appurtenances, and all the estate, right, title, &c. together with a true and attested copy of the said recited indenture of lease, to be made, written and delivered by and at the costs and charges of the said A. B., to have and to hold &c. (*then proceed as usual.*)

And he the said A. B. for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said C. D., his executors, administrators and assigns in manner following (that is to say,) that he the said A. B., his executors, administrators and assigns, shall and will from time to time, and at all times hereafter, unless prevented by fire or other inevitable accident, upon every reasonable request in writing, and at the costs and charges of the said C. D., his executors, administrators and assigns, produce or shew forth, or cause to be produced and shewn forth, in any part of the united kingdom of Great Britain and Ireland, unto and for the perusal of the said C. D., his executors, administrators and assigns, or his or their trustee or trustees, or the counsel or solicitor of him, them or any of them, at any trial, hearing or examination, in or directed by any court of law or equity, and unto or before any commissioners, arbitrators or umpire lawfully appointed, and upon every other necessary and proper occasion, and in such manner and form, and for such time as shall be reasonable, the said recited indenture of lease for the manifestation, support or defence of the estate, right, title, interest or possession of the said C. D., his executors, administrators or assigns, of, in or to the said premises mentioned to be hereby assigned, or any part thereof; and also shall and will, at and upon the like request, costs and expense, and for the like or any other purpose or purposes make and deliver, or cause to be made and delivered to him or them with all reasonable dispatch, true and attested copies duly stamped, of the same indenture, or of any covenants, provisos, clauses or agreements therein contained.

In witness, &c.

VI. ASSIGNMENT *with bargain and sale of fixtures.*

This Indenture, &c.

And whereas it hath been agreed by and between the said parties that the said C. D. should purchase all the fixtures, furniture and utensils belonging to, or being in or upon the said premises, as specified in the inventory or schedule hereunto annexed at or for the price or sum of *l.*

Now this indenture further witnesseth that in consideration of the sum of *l.* of like lawful money as aforesaid to the said A. B. in hand paid by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, and of and from the same &c., he the said A. B. hath granted, bargained and sold, and by these presents doth &c. unto the said C. D., all and singular the several ranges, grates, cupboards, cisterns, coppers, dressers, shelves, pier-glasses, mirrors, chimney-pieces, and all other the goods, chattels, furniture, effects, matters and things, which are mentioned and set forth in the schedule or inventory hereunder written or hereunto annexed. To have and to hold the same unto the said C. D., as and for his own proper goods, chattels and effects, absolutely and free from all liens, debts and charges of him the said A. B., or any person or persons claiming by, from, through, or under him. In witness, &c.

The memorandum of the delivery of the possession of the fixtures should be indorsed on the indenture,

Add the inventory referred to, and see the remarks relative to the stamp, *ante*, 880.

VII. ASSIGNMENT OF A POLICY OF INSURANCE.

This Indenture, &c.

And whereas the said messuages or tenements, and other the buildings hereby assigned, are or have been insured against damage by fire, for the term of *years*, from the *day* of *now last past*, in and by a certain deed or policy of insurance, hereinafter more particularly described, dated the *day* of *at the* Insurance Office in London: and it has been agreed by and between the said parties that the said policy of insurance, and all benefit therefrom, should be assessed to the said C. D.

Now this indenture further witnesseth that, for the considerations aforesaid, the said A. B. hath granted, bargained and sold, and by these presents doth &c. all that deed or policy bearing date, &c., numbered, &c., and being, or purporting to be, under the hands and seals of three of the directors of the Insurance Office or Company, by which said policy of insurance, &c. To have, receive and take the said policy of insurance, and all and every the sum and sums of money, which shall or may become due and payable thereupon, or by virtue thereof, and all other benefit and advantage whatsoever, which shall or may accrue

from or in respect of the same, unto the said C. D., his executors, administrators and assigns, to and for his and their own proper use and benefit, free and clear of and from all and all manner of charges, liens and incumbrances whatsoever. And the said A. B., doth hereby nominate, constitute and appoint the said C. D., his executors, administrators and assigns, his true and lawful attorney and attorneys, to demand, recover and receive all such sum and sums of money as aforesaid in as full and ample a manner as he the said vendor could or might have done, if these presents had not been made. In witness, &c.

VIII. ASSIGNMENT BY INDENTURE of four parts, by the lessee, his mortgagee, an annuitant, and the annuitant's trustee, to a purchaser.

This Indenture &c., between A. B. of &c. of the first part, C. D. of &c. (*the mortgagee*) of the second part, L. M. (*the annuitant*) of &c., and N. O. (*his trustee*) of &c. of the third part, and X. Y. of &c. (*the purchaser*) of the fourth part.

Whereas, &c. (*reciting the original lease as in former precedents.*)

And whereas by an indenture bearing date the day of and made between the said A. B. of the first part, the said L. M. of the second part, and the said N. O. of the third part, the said A. B., for the considerations therein mentioned, granted to the said L. M., his executors, administrators and assigns, for and during the term of ninety-nine years, if the said A. B. should so long live, an annuity or clear yearly rent or sum of l. to be yearly issuing out of the said leasehold premises, during the continuance of the said term of ninety-nine years, if the said A. B. should so long live, and be in possession of the same.

And whereas by the same last mentioned indenture the said leasehold hereditaments and premises, and all the estate and interest of the said A. B. therein, by virtue of the said recited indenture of lease, were granted and demised by the said A. B. to the said N. O., to hold for and during all the rest and residue of the said term, then to come and unexpired, save and except the space of one month previous to and immediately before the end or expiration thereof, in trust nevertheless for the said L. M., and for the further, better and more effectually securing the payment of the said annuity or yearly rent, at or on the days and times therein particularly mentioned.

And whereas the said annuity, and all arrears thereof, have been fully paid and satisfied up to the date of these presents

And whereas by an indenture bearing date the day of of , and made between the said A. B. of the one part, and the said C. D. of the other part, the said hereditaments and premises, and all the said term, estate and interest of the said A. B. in the same by virtue of the said recited indenture of lease, were conveyed and assigned to the said C. D.; subject neverthe-

less to a proviso or condition contained in the same indenture now in recital, for a re-assignment of the said term and premises on payment by the said A. B., his executors, administrators or assigns, of the sum of £. with interest at the time therein mentioned.

And whereas default was made in the payment of the said sum of £. and interest at the time limited by the said proviso.

And whereas all interest upon the said sum of £. hath been paid up to the date of these presents.

And whereas the said X. Y. hath agreed to purchase all the estate and interest of the said A. B. in the said premises, and the said term of years so created as aforesaid, freed and discharged of and from all incumbrances; and it hath been agreed by and between all the said parties hereto that the said annuity or yearly rent so charged thereon as aforesaid should be repurchased at and for the price or sum of £., and that the said principal sum or mortgage money of £. so secured to the said C. D. as aforesaid should be paid off. And that the sum of £. being the residue of the said sum of £. so agreed to be paid as the purchase money of the said premises should be paid to the said A. B. at or before the sealing and delivery of these presents.

And whereas the said L. M. hath agreed upon receiving the said sum of £. so agreed upon as and for the price of the repurchase of the said annuity as aforesaid, to release the said annuity, and to direct and appoint the said N. O. to assign and convey the said term so created for the purpose of securing the said annuity as aforesaid in order that the same may be merged in the said original or reversionary term in the said premises. And the said L. M. and C. D. have agreed respectively to accept the said several sums of £. and £. in full discharge of their respective claims upon the said premises. And the said C. D. hath agreed, upon receiving the said sum of £. so agreed to be paid to him as aforesaid, to convey and assign all his estate and interest in the premises in the manner hereinafter expressed.

Now this indenture witnesseth that in pursuance of the said agreements, and in consideration of the sum of £. of lawful money of Great Britain and Ireland, current in England in hand paid to the said L. M. at or before the sealing and delivery of these presents by the said X. Y. by the direction and with the consent and approbation of the said A. B. testified by his being a party to and executing these presents, the receipt of which the said L. M. doth hereby acknowledge; and of and from the same and every part thereof doth acquit, release and discharge the said A. B. and X. Y., and each of them, and each and every of their respective heirs, executors, administrators and assigns, for ever by these presents, he the said L. M. hath granted, bargained, sold, assigned and released, and by these presents doth, &c. unto the said A. B., his heirs, executors, administrators and assigns, all that annuity or yearly rent or sum of £. granted or secured to him by the said recited indenture of the day

of _____, and charged upon and issuing out of the said messuages, tenements and premises hereinbefore described, and all arrears thereof, and all powers and remedies whatsoever for or on account or in respect of the said annuity or yearly rent, or of any instrument or security made or entered into, or given for or in respect of the same. And all the estate, right, title, interest, benefit or claim whatsoever, as well legal as equitable, of him the said L. M. in to or out of the same, to the intent that the said annuity or yearly sum may be utterly extinguished, released, and discharged. And the said L. M. doth hereby for himself, his heirs, executors and administrators, covenant, declare and agree to and with the said A. B., his heirs, executors, administrators, and assigns, that he the said L. M. hath not at any time heretofore made, done, committed or knowingly suffered, nor caused to be made, done, committed or suffered any act, deed, matter or thing, whatsoever whereby or by reason or means whereof he is become or can or may be rendered incapable of, or prevented from extinguishing or releasing the said annuity or yearly rent-charge of _____ l. in the manner hereinbefore expressed, and according to the true intent and meaning of these presents.

And this indenture further witnesseth that in further pursuance of the said agreement, and in consideration of the sum of _____ l. of like lawful money as aforesaid, in hand paid to the said C. D. at or before the sealing and delivery of these presents by the said X. Y., by the direction and with the consent and approbation of the said A. B., testified as aforesaid, the receipt of which said last mentioned sum the said C. D. doth hereby acknowledge, and of and from the same, and every part thereof, doth hereby acquit, release and discharge the said A. B. and C. D., and each of them, &c. And also in consideration of the sum of _____ l. of like lawful money as aforesaid, in hand paid to the said A. B. by the said X. Y. at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, and of and from the same, and every part thereof, and also of and from the said several sums of _____ l. and _____ l. so paid as aforesaid, he the said A. B. doth acquit, release and discharge the said X. Y., his heirs, executors, administrators and assigns, for ever by these presents, he the said C. D. hath bargained, sold, assigned, transferred and set over, and by these presents doth, &c. And he the said A. B. hath granted, bargained, sold, ratified and confirmed, and by these presents doth, &c. All the said messuages, hereditaments and premises hereinbefore described and contained in the said first recited indenture of lease, with all and singular their rights and appurtenances; and all the estate, right, title, interest, trust, power, terms for years, property, claim and demand both at law and in equity of them, or either of them, of into or out of the said premises, or any part thereof. And also the said in part recited indentures of lease, assignment and mortgage, and all mesne assignments (if any) thereof, and all other deeds, evidences and writings now in the custody or power of them or either of them, or which they or either of them can procure without suit at law or in equity, in any way relating to the said pre-

mises, or any part thereof. To have and to hold the same, with the appurtenances, unto the said C. D., his executors, administrators and assigns, for and during all the rest, residue and remainder now to come and unexpired of the said term of years therein wholly and absolutely freed and discharged of and from the said mortgage sum of £., and all interest thereon; and of and from all other tiens, charges, claims or demands whatsoever, as well legal as equitable, of the said C. D., his executors, administrators or assigns; but subject nevertheless to the payment of the rent, and the performance of the covenants, provisions and agreements reserved and contained in the said first recited indenture of lease, and on the tenant's part to be paid, observed and performed.

And the said C. D. doth hereby for himself, his heirs, executors, and administrators, covenant, declare and agree to and with the said X. Y., his executors, administrators and assigns, that he hath not at any time heretofore made, done, executed or suffered, nor caused to be procured, made, done, executed or suffered, any act, deed, matter or thing whatsoever whereby the said messuages, tenements and premises hereby assigned, or intended so to be, or any part thereof, are, is, can or may be impeached, charged or otherwise incumbered.

And the said A. B. doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said C. D., his executors and administrators, in manner following, that for and notwithstanding any act, deed, matter or thing whatsoever at any time heretofore made, done, committed, executed, or knowingly omitted or suffered by him to the contrary, the said indenture of lease of the day of is a valid and subsisting demise and lease in every respect both at law and in equity, and is not in any manner forfeited, surrendered, or otherwise become void or voidable. And also that for and notwithstanding any act, matter or thing as aforesaid, he the said A. B. hath in himself and in his own right full power and lawful and absolute authority to grant, bargain, sell, alien and assign, the said messuages and premises according to the true intent and meaning of these presents; and also that it shall and may be lawful for the said C. D., his executors and administrators, from time to time and at all times hereafter, peaceably and quietly to enter, &c.; and that free and clear, freely, clearly and absolutely acquitted, &c. (a) *(Add the covenant for further assurance by A. B., and the other usual covenants, as in former precedents.)*

And this indenture further witnesseth that in consideration of the premises, and also in consideration of the sum of 5s. of like lawful money as aforesaid to the said N. O., in hand paid by the said X. Y., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said N. O., by

(a) See *ante*, 889. These limited covenants with the mortgagor do not run with the land: but since the mort-

gagee is a party, and the covenants entered into with him run with the land, this point is immaterial.

the direction and with the consent and approbation of the said L. M., testified by his being a party to and executing these presents, hath bargained, sold, assigned, transferred and set over, and by these presents doth, &c. unto the said X. Y. his executors, administrators and assigns, all the said messuages, &c. hereinbefore described and contained in the said indenture of the day of secondly hereinbefore recited, and the said term of years thereby created, And all the estate, &c. To the intent that the same term may be merged and extinguished in the immediate reversion of the said premises.

And the said N. O. doth hereby for himself, his heirs, executors, administrators and assigns, covenant, declare and agree to and with the said X. Y., his executors, administrators and assigns, &c. (e)

In witness, &c.

(e) Covenant against incumbrances as before.

IV. EXPRESS SURRENDERS.

I. SURRENDER BY DEED POLL TO BE INDORSED ON THE INDENTURE OF LEASE.

To all to whom these presents shall come the within named C. D. sendeth greeting. Now know ye that the said C. D., at the special instance and request of the said A. B., hath assigned, surrendered and yielded up, and by these presents doth assign, surrender and yield up unto the said A. B. the messuages, lands and hereditaments, in and by the within written indenture, granted and demised for the within mentioned term of years, and all the estate, right, title and interest of him the said C. D., by virtue of the said deed or otherwise howsoever, together with the same within written indenture, To have and to hold the said messuages and premises and their appurtenances to the said A. B., his heirs and assigns, for ever.

In witness, &c.

II. ANOTHER FORM BY DEED POLL.

To all, &c. I, C. D. send greeting: Whereas by indenture bearing date, &c. (*reciting the lease as in the case of assignments*) (a). Now know ye that I the said C. D. do hereby, in consideration of 5s. of lawful money of Great Britain to me in hand paid by the said A. B. at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, for me, my executors and administrators, surrender and yield up, from the day of the date hereof, to the said A. B., his heirs and assigns, all the said messuages, tenements, hereditaments and premises, and the said term of years therein yet to come, and all right, title and interest therein, which I or they may claim by virtue of the said indenture of lease, or otherwise howsoever, and that free and clear, and freely, clearly and absolutely freed and

(a) *Ante*, 889.

discharged, of and from all incumbrances of what kind soever at any time, by me or by my privity, consent or procurement, made, done, committed or suffered.

In witness, &c.

III. FORM OF SURRENDER BY INDENTURE OF A LEASE FOR LIVES, IN ORDER TO A RENEWAL.

This Indenture, &c.

Whereas by an indenture of lease bearing date, &c. (*proceed us in assignments to recite the original lease*).

And whereas the said one of the persons named as a life in the said lease has since departed this life.

And whereas the said A. B. hath agreed with the said C. D. to grant a new lease to him of the said hereditaments hereinbefore described, during the lives of the said and the two surviving lives in the said recited lease, and the life of (*the new nominee*) of, &c. aged about years, upon the said C. D. surrendering up the said recited indenture, and the premises therein comprised, in the manner hereinafter expressed.

Now this indenture witnesseth that in consideration of the sum of 5s. of lawful money of Great Britain to the said C. D., in hand paid by the said A. B., at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said C. D., at the request of the said A. B., hath surrendered and yielded up, and by these presents doth, &c. to the said A. B. and his heirs the said messuages and premises hereinbefore described and comprised in the said recited indenture of lease, together with the same indenture of lease, and all the estate, &c. To the end and intent that the same may be merged and extinguished in the freehold, reversion and inheritance of the same premises, and in order that the said A. B. may by an indenture already prepared and engrossed, and bearing or intended to bear even date herewith be enabled to make a new lease and grant thereof for and during the natural lives of, &c. (*Add covenant by lessee that he has not encumbered.*)

In witness, &c.

IV. ARTICLES OF AGREEMENT UNDER SEAL BETWEEN LANDLORD AND TENANT, WHEREBY THE TENANT SURRENDERS UP PART OF THE PREMISES TO THE LANDLORD, IN CONSIDERATION OF WHICH THE LANDLORD RELEASES PART OF THE RENT.

[*To be indorsed on the back of the lease.*]

Memorandum of agreement dated the day of between the within named A. B., and the within named C. D. Whereas the said A. B., having occasion now to use, occupy and enjoy a stable and hayloft, and also a piece of ground lying before

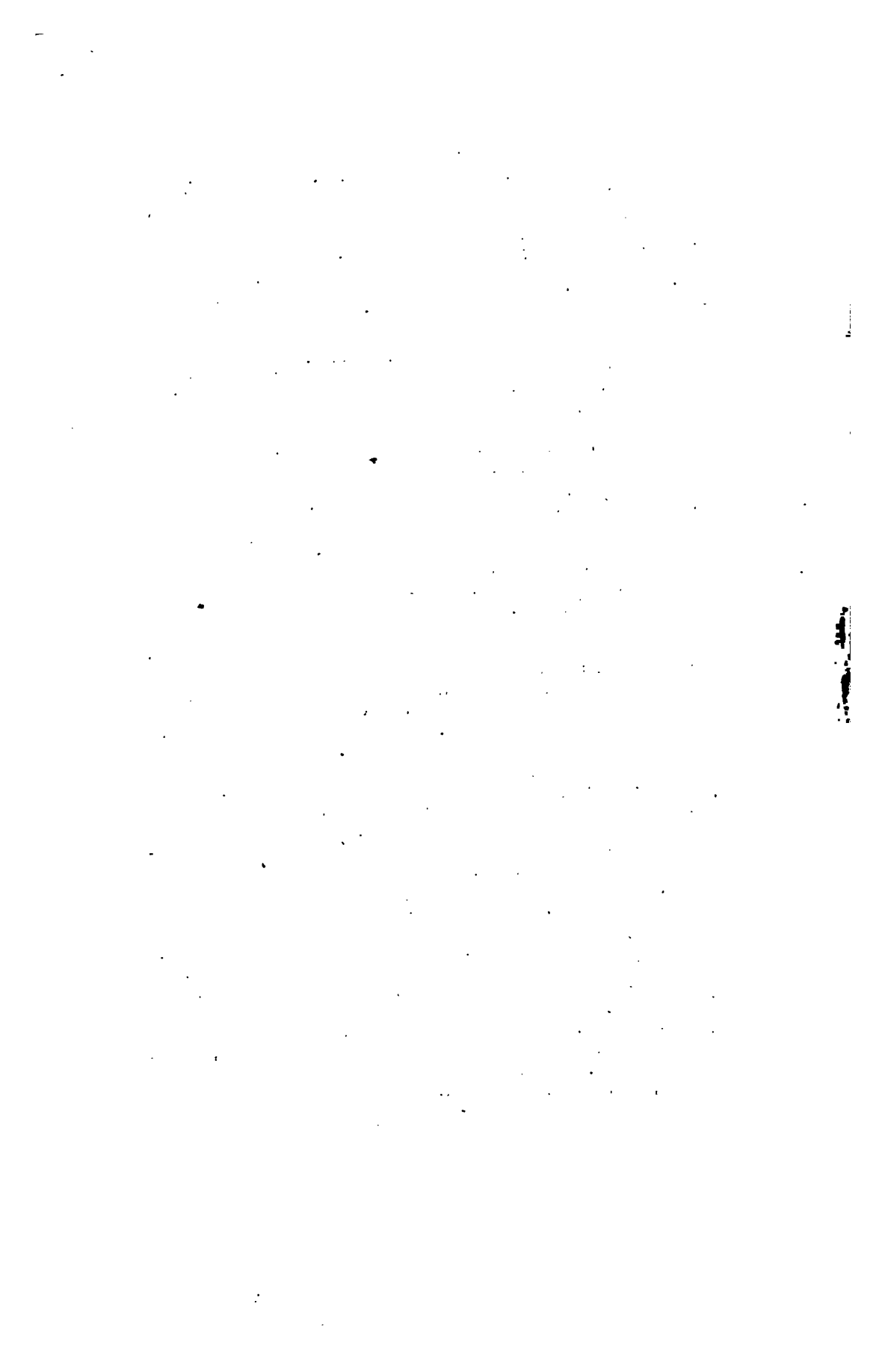
the same, being part of the premises demised to the said C. D., by the within written indenture, hath requested the said C. D., and the said C. D. hath thereupon agreed to yield and surrender all his estate, right, interest and term of years, of in and to the same, in manner hereinafter mentioned.

And whereas, in consideration of such surrender, the said A. B. hath agreed to abate unto the said C. D. the yearly sum of £ of lawful money of Great Britain, out of the rent reserved in and by the within written indenture.

Now it is hereby witnessed that the said C. D., in pursuance of the said agreement, and at the request of the said A. B. as aforesaid, and in consideration of the sum of 5s. of such lawful money as aforesaid, the receipt whereof is hereby acknowledged, hath freely, clearly and absolutely surrendered, assigned and yielded up unto the said A. B. all the said stable, &c. together with all ways, passages, waters, watercourses, profits, commodities and appurtenances whatsoever, to the said hereby surrendered premises belonging, and therewith now used, occupied and enjoyed, and all the estate, right, title, interest and term of years to come, possession, property, claim and demand whatsoever, of him the said C. D., of in and to the said hereby surrendered premises, by virtue of the within written indenture, or otherwise howsoever, To have and to hold the said surrendered premises with their appurtenances to the said A. B., his executors, administrators and assigns, for and during all the rest and residue of the said term of years, in and by the within written indenture, limited and created, which is now to come and unexpired, in as full, ample and large a manner, to all intents and purposes, as he the said C. D., his executors, administrators or assigns, could or might have held, occupied or enjoyed the same in case these presents had not been made.

And it is further witnessed that the said A. B., in pursuance of the said recited agreement on his part, and in consideration of the said surrender so made of the said stable and premises as aforesaid, for himself, his heirs, executors and administrators, hath freely, clearly and absolutely relinquished, abated, released and discharged, and by these presents doth, &c. the said C. D., his executors, &c. from henceforth during the now residue of the term of years so limited and created, in and by the within written indenture as aforesaid, of and from the payment of the yearly sum of £, being part of the yearly rent of £ by the said within written indenture of lease, reserved and made payable to him the said A. B. and his heirs, and also of and from all actions, suits, distresses, claims and demands whatsoever, of him the said A. B., his heirs, executors or administrators, touching or concerning the said sum of £ hereby expressed, or intended to be abated and released as aforesaid.

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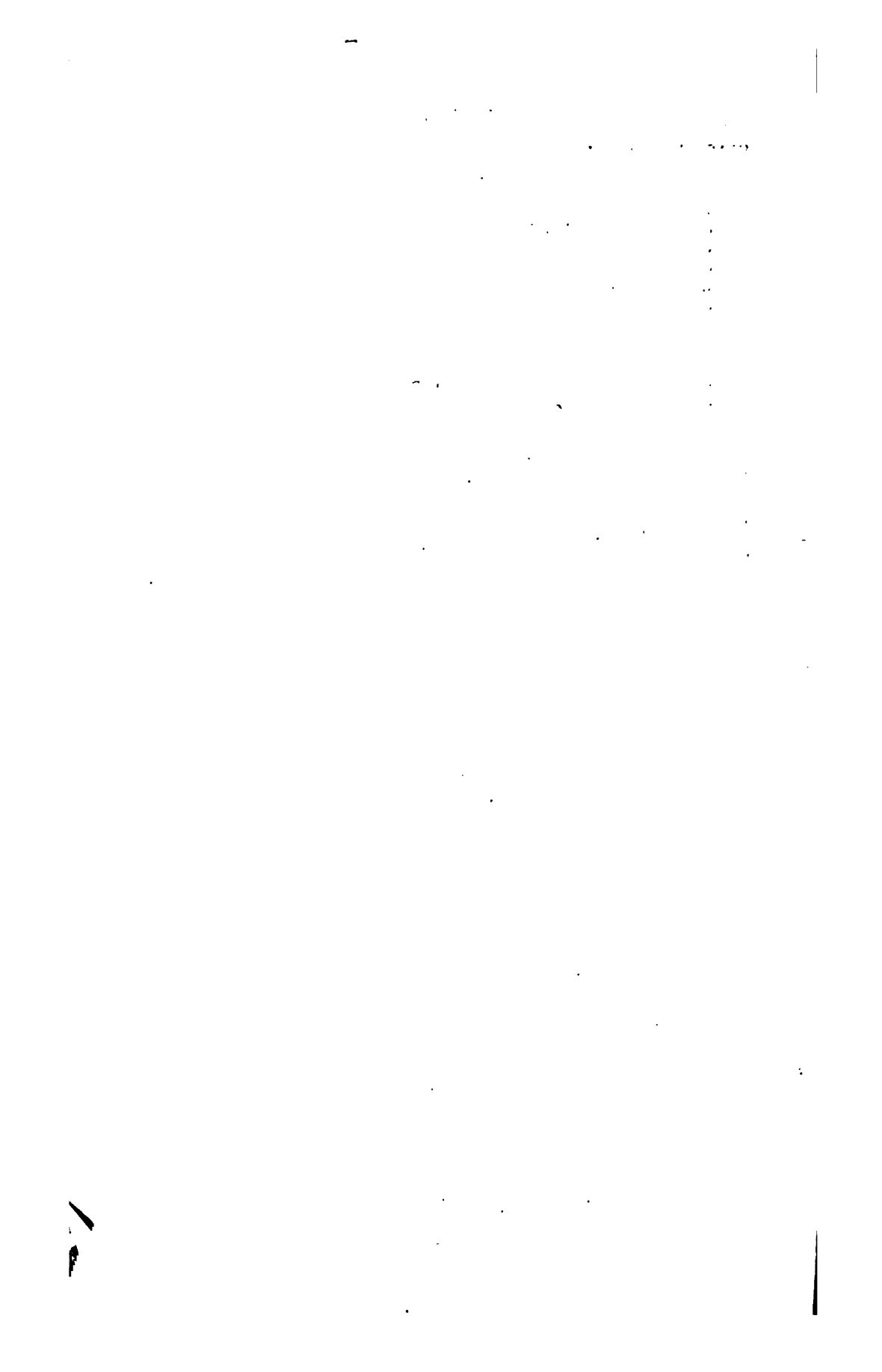
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ADDENDA ET CORRIGENDA.

Page 16, line 3, Add,

Since the observations made in the introduction (page 12 *et seq.*) were sent to the press, the following case has been reported, (*Partridge v. Bere*, 5 B. and A. 604). In an action for diverting a watercourse, the declaration contained an averment, that a certain close was in the possession and occupation of one A. as tenant to the plaintiff, the reversion belonging to the plaintiff. At the trial before Park J. it appeared, that A. being tenant for life of the close mentioned in the declaration in March 1817, had mortgaged the same to the plaintiff for 100*l.* for a term of years, provided he the tenant for life lived so long; and that the tenant for life had since that time continued in possession and paid the interest. It was objected on the part of the defendant, that the relation of landlord and tenant did not subsist between a mortgagor and mortgagee, and consequently that the averment was not supported by the evidence. The learned judge overruled the objection; and now Adam moved for a new trial relying on the opinion of Buller J., in *Birch v. Wright (a)*. *Per curiam*. Here the mortgagor was in actual possession of the premises, *by sufferance* of the mortgagee who has the legal title vested in him. The former, therefore, is a tenant in the strictest sense of that word.

It will be obvious to the reader that many of the observations in the text are applicable to this case. Great inaccuracy of expression is evident, and perhaps with reference to third persons, as in the case before us, it is rather a dispute about words to deny that for some purposes the mortgagor may be considered tenant to the mortgagee: but that he is not strictly tenant at will or tenant at sufferance seems to have been clearly proved; neither can the relation come under the usual denomination of landlord and tenant.

So again in another case (b) in the same book a similar point came into dispute. On error, it appeared that the premises had been mortgaged in fee, with a proviso for reconveyance if the principal and interest were not paid at a given day, and that in the mean time the mortgagor should remain in possession. Upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor. Littledale contended that after default of payment the mortgagor was tenant by sufferance, and that no interest appearing to have been paid, his possession from that time was adverse, and barred the mortgagee after twenty years by the statute of limitations: but the Court held that the occupation must be considered to be by permission of the mortgagee unless the contrary be found, and that they could not presume a wrongful possession unless the jury found it by the special verdict.

Page 45, line 16. In *Conesby v. Ruskey*, Cro. Eliz. 459, it is however said, that the same law is where the lessor is tenant for life or in tail of a manor, and the lessee for life or tenant in tail makes a lease for years of the copyhold: though *quoad* himself the custom is gone, yet *quoad* the issue or reversioner the custom is not gone. See also *Harg. Co. Litt.* 58. b. n. 7.

Page 48, line 19. The statute 33 Hen. VIII. c. 22. is cited in *Gilb. Exch.* 106.: but I have in vain sought for that or any other statute to the same effect.

Page 51, lines 4, 5. Perhaps it ought to be remarked, that the words "or otherwise shew his right" &c. "without attending other commandment," &c. are not without their meaning: for before this statute, (which includes a *monstrans de droit* as well as a traverse properly so called,) it was held that in a *monstrans de droit*, although upon the traverse or denial of the King's title, the issue should be found for the plaintiff, yet the judges could not proceed to judgment without a writ of *procedendo*. The statute of 8 Hen. VI. includes a traverse on a *monstrans de droit*, as well as other kinds of traverse. (c)

Page 55, line 21. See *Selw. N. P. n.* 8. where the case of *Willand v. Fenn* is stated to have been compromised before the third argument.

Page 69. (c) Insert "*Gibbins v. Howell*," the name of the case, in 3 *Madd. Ch.* 469.

Page 69, last line but one, after "reversioner" add "or any forfeiture arising from tortious acts of the tenant."

Page 101, line 28. By a recent act stat. 3 Geo. IV. c. 81. s. 3. assignees

(b) *Hall v. Doe d. Surtees*, 5 B. and A. 687.

(c) *Commonalty of Saddlers' Case*, 4 Rep. 54. n.

of bankrupts are enabled to execute powers previously vested in bankrupts: and by s. 4. the Lord Chancellor on petition by the assignees, or by a purchaser from them, may order bankrupts to join in conveyances; and on their neglecting to do so, such bankrupts, and those claiming under them, shall be estopped from objecting to the validity of the deed.

By statute 3 Geo. IV. c. 123, intituled an act to amend an act of the first year of his present Majesty for the relief of insolvent debtors in England, s. 3. power is given to all assignees to exercise the powers given to provisional assignees; and it is enacted that the assignment to assignees shall vest the estate from the time of the first assignment, but not so as to avoid the intermediate acts of the provisional assignee.

Page 142, line 12, read *charity* leases.

Page 143, line 8. In the Attorney-General v. The Mayor of Stamford, Easter, 20 Geo. II. 1747, in Ch. (App. to Vol. II. Swanst. Ch. Ca. 592,) the following positions are laid down:—

1. That where a lease is made by the trustees of a charity at an under-value, by collusion between them and the lessee, this court can not only make a decree against the trustees, but also against the lessees for the surplus money: but this is to be done only where the circumstances of such collusion are very strong. The meaning of which latter clause seems to be that collusion cannot be established without strong evidence.

2. That where power is given to the trustees of a charity to make leases generally, they have a power, both at law and in equity, either to take fines or reserve rents as is most beneficial for the charity.

3. That in this case in the leases made by the Mayor, Aldermen and Burgesses (the trustees,) there being covenants from the lessees for grinding at the corporation mill, such covenants were improper.

The information as against the representatives of the past Mayor of Stamford, and the late Schoolmaster, and the lessees, was dismissed with costs, no misbehaviour being proved against them: but as to the corporation of Stamford without costs, on account of an order made by them, that in the charity leases there should be covenants for grinding at their mills; and Lord Chancellor said he would not give costs for this reason, rather *in terrorem* than because the charity would suffer by such order.

This charity had never been established; either by a commission of charitable uses or by a decree. The Lord Chancellor therefore declared the charity to be established, and decreed the same accordingly: and it was referred to the master (among other things) to consider what would be the properest way of making leases, and to report accordingly.

Page 150, line 28. But the grant of land to a college not beneficially but in trust for other objects is not within the exception of the mortmain

act in favour of Universities. See *Attorney-General v. Munby*, 1 Meriv. Ch. Ca. 327.

Page 168, line 3, *dele* the second "power."

Page 173, last line. Add "But a letter from a mother to her son, beginning 'My dear Robert,' and concluding 'your affectionate mother,' without any name, is not a signing within the statute. *Selby v. Selby*, 2 Meriv. Ch. Ca. 2."

Page 187, last line. Insert the words "it amounts to" before "part performance."

Page 217, line 14. After "title" add "because a court of equity cannot assist a man to nullify his own solemn act, although voluntary."

Page 226, line 23. For "costs," read *covenants*.

Page 230, line 16. After the words "agreement into effect:" for the colon [:] read a comma [,].

Same page, last line but one. After the word "renew" insert a comma [,]; and in the last line *dele* the comma [,] after the word "them."

Page 236, line 8. After "being" insert "usually."

Page 290, line 18. The case stated is that of *R. v. N. Daffield*, 3 M. and S. 247.

Page 294, n. (d) line 3. After "c. 4." insert "Irish."

Page 305, n. (u). Add, "But see 2 Selw. N. P. 777."

Page 311, line 20. For "were" read *was*.

Page 320, n. (p). For "Darby" read *Darley Abbey*.

Page 322, line 19, Add, "But in *Farrant v. Thompson*, 5 B. and A. 826. where certain *mill machinery*, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seised under a *f. fa.* by the sheriff, and sold: it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the term. The case of *Gordon v. Harper* was cited: but the court made a distinction between that case and the present. Here the machinery was part of the inheritance; in the other the goods were mere personal chattels; and the tenant did not by any wrongful act put an end to his qualified possession of them. Here the machinery, when severed wrongfully, became the property of the landlord.

Page 334, line 4. Since the above was printed the following case has been reported.—*Kooystra v. Lucas*, 5 B. and A. 830. Lease of a piece of ground, part of a yard adjoining, with all ways to the demised premises belonging, or with any part thereof used or enjoyed. At the

time of the lease the whole yard was in the occupation of one person, who had always used and enjoyed a right of way to every part of the yard. Held that the lessee was entitled to a right of way to the part of the yard demised to him.

Page 338, ref. (z). For "Maxwood" read *Manwood*.

Same page, ref. (c), last line. For "sol." read *pl.*

Page 339, ref. (f). For "Repia" read *Regina*.

Page 341, 10th line from bottom. After the word "interest" read *his right*.

Page 344, line 20. For "every other particular," read *most other particulars*; and see the distinction between exception and reservation, page 404.

Page 348, ref. (o) for "B. 1 Moor." read *1 B. Moor.*

Page 358, line 18. For "as" read *in*.

Page 359, line 22. For "county" read *country*.

Page 368, line 4. "For A." read *her*, (*Mary Bromfield.*)

Page 392, after line 2. "Where premises had been demised by two tenants in common, and the rent had been paid for some time to the agent of both; but afterwards the tenant had notice to pay a moiety of the rent to each, and the rent was so paid and separate receipts given. Upon a joint action being brought it was held to be a question for the jury to determine, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, 5 B. and A. 850."

Page 400, ref. (o) Add, see "*Nash v. Palmer*, 5 M. and S. 374."

Page 420, line 31. For "c. 60." read *c. 40*.

Page 425, *l. ult.* Add, "The Hull Dock Company were held rateable in respect of tonnage duties received by virtue of stat. 14 Geo. III. c. 56., although it appeared that the expenditure in repairs during the period, exceeded the amount of the duties received. *R. v. Hull Dock Company*, 5 M. and S. 394."

Page 428, line 6. "A person occupying at 4*l.* a year part of a dwelling-house of the annual value of 18*l.* a year, does not since the stat. 35 Geo. III. c. 101. s. 4. acquire a settlement, though he be rated and pay the church and poor-rate for the whole house. *R. v. Penryn*, 5 M. and S. 443."

Page 433, ref. (y) *delete* the second "*Taylor v. Read*, 6 Taunt. 249."

Page 436, ref. (p). For "*Gunnyton*, 4 T. R." read *Errington*, 5 T. R.

Page 441, ref. (p). For "Duke" read *Dean*.

Page 462, line 22. "Where there was a demise of a slate pit at B. and stone quarries at C., to hold the slate pit from the 25th March 1815, for the term of fourteen years, and the stone-quarries from the 29th

Sept. 1817 for a similar term of fourteen years, and there were separate *reddenda*: this was considered all one transaction, and *ad valorem* stamp upon the aggregate amount of the rents was held sufficient. *Bosse v. Jackson*, 3 Brod. and B. 185."

Page 496, line 6. For "c. 4." read c. 3.

Page 525, line 16. For "reduced" read *reducible*.

Page 526, ref. (s) Add, "*See Pickard v. Roberts*, 3 Madd. Ch. Ca. 385."

Page 567, line 10, Add, "This doctrine was, indeed, expressly overruled by the certificate of the Court of Common Pleas, on a case sent to them by Sir W. Grant, late *M. R. Beard v. Wescot*, 5 Taunt. 407. But the same point has been recently sent to the Court of King's Bench, in the shape of a case arising out of the same cause, by the present Lord Chancellor, and the certificate of the judges is reported in 5 B. and A. 801. The decision of the King's Bench is directly subversive of that of the Common Pleas; and Lord Eldon has expressed himself satisfied with it. The point, therefore, may be considered as set at rest according to doctrine in the text, unless the parties choose to carry the cause to the House of Lords."

Page 594, *ad fin.* "In *Bliss v. Collins*, 5 B. & A. 876. Two messuages were conveyed to such uses as A. should appoint, and in default of appointment to A. in fee in the usual way to bar dower. A lease both for years, at an entire rent, and then during the term contracted to sell the reversion of one of the messuages. In the contract of sale, the messuage was described to be in lease, and that the apportioned rent in respect of it was 40*l.* A. then conveyed the messuage with the apportioned rent, to the vendee. It was held, that the vendee did not acquire the same rights and remedies against the lessee, as he would have acquired if the rent had been legally apportioned by a jury, the lessee not being bound by an apportionment without his consent."

Page 687, after line 19. "In debt for use and occupation after judgment by default, it is not clear that a writ of inquiry is not necessary before signing final judgment. *Arden v. Connell*, 5 B. & A. 885."

Page 721, line 23. "On a recent occasion, when the case of *Harrow School v. Alderton* was cited in support of the maxim *De minimis non curat lex*; Lord Eldon observed, that the doctrine as applicable to waste depended on an ancient statute; which he was not aware of at the time that case was decided."

Page 768, line 12. For "ejectionem," read *eject.*

Page 779, line 22. For "have" read *grant*.

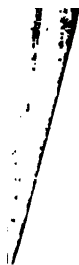
Page 779, line *penult.* "The notice at the foot of the declaration need

not be in the name of the plaintiff, but may be in the name of the lessor of the plaintiff, or any other person, in order to obtain judgment against the casual ejector, *Goodtitle d. Duke of Norfolk v. Nottile*, 5 B. & A. 849."

Page 782, *ref. (y)* Add, "*See Doe d. James v. Harris*, 5 M. & S. 326."

Page 794, *l. ult.* "In ejectment, proof of service of the declaration on the tenant in possession is sufficient to prove that the defendant comes in as landlord without producing the landlord's consent rule. *Doe d. Giles v. Warwick*, 5 M. & S. 393."

THE END.



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